TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~548.~~ 100

THE NEW YORK CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES C. LOCKWOOD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 17, 1871.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles C. Lockwood, plaintiff, and The New York Central Railroad Company, defendant, a manifest error hath happened to the great damage of the said The New York Central Railroad Company, as is said and as appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

U. S. circuit court, southern dist. of New York.

THE NEW YORK CENTRAL RAILROAD COMPANY, pl'ffs in error,
vs.
CHARLES C. LOCKWOOD, DEF'T IN ERROR.

I, Kenneth G. White, clerk of the circuit court of the United States for the southern dist. of New York, in the second circuit, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 146, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The New York Central Railroad Company, pl'ff in error, and Charles C. Lockwood, def't in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26 day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE,
Clerk.

(Indorsed:) U. S. Supreme Court. The New York Central Railroad

Company, plaintiff in error, vs. Charles C. Lockwood, defendant in error. Writ of error. Strong & Shepard, attorneys for pl'ff in error, 90 Broadway, N. Y.

Allowed March 21, 1871.

SAM'L BLATCHFORD.

Filed March 21, '71.

[5-ct. int. rev. stamp affixed and canceled.]

1 Circuit court of the United States for the southern district of New York.

Pleas before the judges of the circuit court of the United States for the southern district of New York, at the term thereof held in the city of New York, on the third Monday of October, in the year of our Lord one thousand eight hundred and seventy.

Witness the Hon. Lewis B. Woodruff, judge of the circuit court of the United States for the second judicial circuit.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the first day of the term of the circuit court of the United States for the southern district of New York, commencing on the third Monday of October, in the year of our Lord one thousand eight hundred and sixty-three, at the court-room in the city of New York, came Charles C. Lockwood, by Trueman Smith, esq., his attorney, and brought into said court, before the Hon. Samuel Nelson, the justice thereof, according to the statute in such case made and provided, his certain declaration against The New York Central Railroad Company, being a plea of trespass on the case; which declaration follows in these words, that is to say:

2 United States circuit court for the southern district of New York.

CHARLES C. LOCKWOOD, PLAINTIFF,
against
THE NEW YORK CENTRAL RAILROAD COMPANY,
defendants.

Charles C. Lockwood, the plaintiff in the above-entitled action, *of* citizen of the State of Connecticut, residing at Stamford, in the county of Fairfield, in said State, complains of The New York Central Railroad Company, (a body politic and corporate, duly made, constituted, and organized, under and by virtue of an act of the people of the State of New York, represented in senate and assembly, whereof the corporators therein are citizens,) the defendants in said action, on a plea of trespass on the case; whereupon the said plaintiff declares and says that, heretofore, to wit, on or about the first day of January, anno Domino one thousand eight hundred and fifty-eight, the said defendants were, and ever since have been, and still are, a body politic and corporate as aforesaid, and as such did own and possess, and ever since have and still do own and possess, a certain railroad extending from the city of Buffalo, in the county of Erie, to the city of Albany, in the county of

Albany, both in the State last aforesaid, and were, during the period aforesaid, and still are, engaged in the business of transporting, for hire or reward, cattle and other live stock on and over said road from
3 said city of Buffalo and intermediate places to West Albany, at or near said city of Albany, by means of certain trains called "cattle trains;" and also on the same trains certain passengers, namely, the owners of such cattle, or the agents or servants of such owners, to supervise and take care of said cattle on or during their transit or passage from said city of Buffalo or some intermediate place to said West Albany. And the said plaintiff says that the said defendants have, at all times during said period, required the owners of the respective lots or parcels of cattle on such trains, or their agents, to accompany the same; and it hath at all times been, during said period, according to the regulations of the defendants and the usual course of their business for such owners or their agents to accompany the same on their passage aforesaid for the purpose aforesaid. And the said plaintiff says that the distance from said city of Buffalo to West Albany is about three hundred and twenty-eight miles, and the regular or usual time occupied by one of said "cattle trains" in the trip or passage from said Buffalo to said West Albany is and at all times has been about thirty-six hours; and that the said defendants have at all times caused said cattle trains to move on and over said road continuously, or night and day, and that cattle placed in cars comprising such trains became leg-weary, and thereafter, when any such train stops or comes to a halt, the cattle therein, or some of them, are accustomed to lie down in the cars, and may, at either times, by the irregular or violent action of the engine attached to said train, be thrown down, and when thus down are liable to be trampled on and injured by the cattle standing up in the same car, which hath at all times been well known to the said defendants.

And the said plaintiff says that the said passengers, being
4 lawfully on any and every of such trains as aforesaid, were accustomed, and were and ever have been authorized and required by said defendant, to *cut* off the same whenever, in its transit from the said city of Buffalo or any intermediate place to said West Albany, such trains stopped or came to a halt, & to pass and repass on said road and along the same to and from the car or cars containing their cattle, respectively, to the end and for the purpose aforesaid.

And the said plaintiff says that, heretofore, to wit, at said city of Buffalo, on or about the fifth day of June, anno Domini one thousand eight hundred and fifty-eight, the said defendants, being the owners of said road as aforesaid, and being engaged in the business aforesaid, were about to form a cattle train to pass over said road from said city of Buffalo to said West Albany, and the same was then and there offered to the public and open for the reception of cattle and passengers as aforesaid, to be transported therefrom over said road to said West Albany, for hire; and thereupon, to wit, at said Buffalo on or about the fifth day of June, the said plaintiff caused to be placed on said train, and in two of the cars thereof, thirty head of fat cattle, then and there the proper estate of the plaintiff, and he (the said plaintiff) then and there, at the special instance and request of the defendants, engaged and took, for his said cattle and for himself, for the purpose and with the intent aforesaid, a passage in said train, to be safely and securely carried over said road from said city of Buffalo to said West Albany for a certain fair or reward to the said defendants by the said
5 plaintiffs then and there paid in that behalf; and thereupon it

became and was the duty of the said defendants to have the said road in a proper state and condition for the business aforesaid, and particularly to have the chasm or opening in and across a high embankment with a steep ascending grade constituting a part of said road, as hereinafter described, covered over or lighted up, whereat said train would in due course arrive during the night then next ensueing, and it became and was likewise the duty of the said defendants to employ on said train a good and sufficient engine, and particularly one adequate to take and draw the same up the grade aforesaid and over the chasm aforesaid, so as to afford all just and proper security of life and limb to the said plaintiff and other like passengers on said trains; yet the defendants, not regarding their duty in that behalf, did not, said trip, have, nor have they at any time had said road in a proper state or condition for said business, for the plaintiff says that there was at said time, and ever has been, in the town of Lenox, county of Madison, a high embankment constituting a part of said road, with a steep ascending grade, as said road runs from the direction of said Buffalo towards said West Albany, in and across which embankment there then was and ever has been a chasm or opening of about fourteen feet wide and twenty feet deep, with perpendicular walls, over which they (the defendants) had not then, nor had they at any time placed any covering or bridge, nor maintained in the night season any light, nor taken other precautions to guard any passenger on said train who might at said place have occasion to get off the same, and to pass and repass on said road
6 for the purpose aforesaid, against any danger arising from the cause aforesaid, nor did the said defendants use or employ on said trip a good and sufficient engine or engines, nor any adequate power to take said train up said ascending grade and over said chasm or opening existing in said road as aforesaid, but the engine which the said defendants had caused to be attached to said train, and which they employed to draw the same was then and there wholly insufficient and inadequate in power to and for the purpose aforesaid, although the said defendants well knew that said train with the plaintiff and his said cattle, on leaving said Buffalo, on said fifth day of June, would, in due course, arrive at said place during the night then next ensueing, and although they well knew that the engine employed to move or carry forward said train would prove inadequate to take said train up the grade aforesaid, and that, in consequence, the plaintiff might, and probably would, on the arrival of said train at said place, have occasion to get off the same, and to pass and repass over said road to and from the cars containing his said cattle, for the purpose aforesaid, and would then be exposed to the danger of being plunged headlong or otherwise into said chasm, thereby losing his life or receiving grievous bodily harm. And the said plaintiff says that the said defendants did, as aforesaid, conduct and demean themselves in the premises rashly, presumptuously, and with gross carelessness, and did wantonly and recklessly, in manner aforesaid, expose the plaintiff to the danger aforesaid, and have at all times exposed in like manner other like passengers to the same danger.

7 And the said plaintiff says that he, with his said cattle, having left said Buffalo for said West Albany, on said train, on the said fifth day of June, at about *two* o'clock in the forenoon, arrived at said place, in said town of Lenox, during the ensuing night, that is to say, about two o'clock of the morning *of the morning* of the sixth day of June, when the engine by said defendants attached to said train, proved wholly inadequate in power to take the same up said ascending

grade, and over said chasm or opening in said road; and said train, with the plaintiff and his said cattle thereon, was then and there, from the cause aforesaid, stopped on said road and over said chasm or opening, or near the same; and the engineer and other servants and agents of the said defendant, did then and there continue for a long space of time, to wit, one hour, to back said train down said grade, and thereto rush the engine and train forward with great force and violence, with intent to overcome the same, if possible, and then and there did jerk down several of his said cattle in each of said cars, and did cause several others of the same to lie down, thereby exposing them to great danger of injury in the manner and from the cause aforesaid, of which the said defendant, by one of their servants or agents on said train, then and there gave notice to the plaintiff, whereupon the said plaintiff then and there got off from the said train on to said road, as he was authorized and required by the said defendant to do, and attempted by and with their consent to pass on and along the same to the cars containing his said cattle, for the purpose aforesaid, when the said plaintiff, not having any knowledge of said chasm or opening in said road,

8 and without any negligence or want of care on his part, was, by reason of the default, gross negligence, and presumptuous conduct of the said defendant, (as hereinafter set forth,) thrown and precipitated headlong and with great force and violence into said chasm or opening, whereby his head, brain, and spine were greatly bruised, contused, and injured, and whereby his face, neck, back, breast, arms, legs, and divers other parts of his body were greatly lacerated, wounded, and injured, and whereby he was rendered wholly insensible for a long space of time, to wit, twelve hours, and whereby he sustained great pain and distress from thenceforth hitherto, and whereby his life was greatly endangered, his health undermined, and himself rendered at all times hitherto incapable of attending to any business whatever, and whereby he was compelled to expend and did expend a large sum of money, to wit, the sum of one thousand dollars, for medicine, medical attendance, nursing, board and lodging.

And the said plaintiff further says that, afterward, to wit, on or about the fifth day of June, anno Domini, one thousand eight hundred and fifty-eight, the said defendants being then and ever since a body politic and corporate as aforesaid, and owners of the said road aforesaid, and engaged in the business of transporting cattle and other live stock on and over said road from said city of Buffalo and intermediate places to said West Albany (by means of certain trains called "cattle trains,") and the owners of said cattle, or their servants and agents, for the purpose aforesaid, and having the license & authority aforesaid, did

9 wantonly, recklessly, and with gross carelessness, have, keep, and maintain said road, and have for a long time before and since had kept and maintained the same in such a state and condition, and did then conduct and have at all times conducted their said business in such a manner as to expose such passengers, and each and every of them while on said road, to the imminent danger of losing their lives, or of sustaining some grievous bodily harm, for the said plaintiff says that said defendants had, at a certain place in the town of Lenox, in the county of Madison, without any good or sufficient reason, caused their said road (where the same is carried over the Erie Canal from the north to the south side thereof) to be made and constructed in an unsuitable, unsafe, dangerous, and improper manner, and so as to greatly endanger the safety of the passengers aforesaid, by raising on the north side of said canal a high embankment, & by locating and placing their road on

such embankment, at and with a grade unnecessarily severe and difficult, and making the same so steep as to be and prove impracticable, particularly for the cattle trains aforesaid, and leaving in and across said embankment and under said road, several, to wit, three chasms or openings, each fourteen feet wide and twenty feet deep, and with nearly perpendicular walls; and by not placing on and over said chasms, nor over either of them, any bridge or other covering for the safety and security of said passengers or other persons lawfully on said road, and passing on and along the same. Whereas the said plaintiff avers and says that the said grade might and should have been greatly reduced by extending said embankment, and said chasms or openings might and should have been covered over so as to render the same entirely safe, and might have been so covered at a trifling expense, to wit, ten dollars each; and on said fifth day of June, the said defendants had

10 been accustomed to start and ever have started said cattle trains from said Buffalo at such times, and run the same in such manner as to arrive on said embankment and on said chasms or openings in the night season; and such trains on said fifth day of June, often had and usually were and have been since, by reason of the steepness and severity of said grade, and the inadequacy in power of the engines employed by the said defendants on such trains, or by overloading the same, arrested in the night season on said embankment and over said chasms, when and where, by reason of the cattle therein lying down in the cars or being jerked off their feet or thrown down therein, it had, on said fifth day of June, and long before and since, has been necessary, proper, and usual for such passengers to get off the same and to pass and repass along said road to and from the cars containing their cattle, respectively for the purpose aforesaid, of which the said defendants have at all times had knowledge and notice, and the said defendants had not, on said fifth day of June, nor have they at any time since, kept or maintained in the night season any light at either of said chasms to notify such passengers of the existence thereof; nor have they at any time adopted or taken any other precaution to prevent said passengers from being plunged headlong or otherwise into said chasms or some one of them; but they, the said defendants, were on said day, and long had and since have been conducting and transacting their said business by reason of the facts aforesaid, rashly and presumptuously and with a reckless disregard of the safety in life and limb of the passengers aforesaid.

11 And the said plaintiff says that, on or about the said fifth day of June, being at said Buffalo, and there having and owning thirty head or two car loads of fat cattle, and being desirous to engage of and from said defendants, for himself and his said cattle, a passage or transportation over said road from said Buffalo to said West Albany, and being a stranger to said road and having no knowledge or notice of the facts aforesaid, applied to said defendants for such passage or transportation, and it was then and there agreed by and between the said plaintiff and said defendants, in consideration that he, the said plaintiff, had then and there, at the special instance and request of said defendants, paid to them one hundred and forty dollars, or seventy dollars for each of two car loads, (containing fifteen head of said cattle in each car,) that they should safely and securely transport said cattle on a cattle train which they were then and there about to form, from said Buffalo to said West Albany, and in consideration of such engagement and payment that they should in like manner transport the plaintiff himself on the said train from the place aforesaid to the place aforesaid, for the purpose aforesaid.

And the said plaintiff further says, that the said defendant did then and there caused to be prepared and presented to the said plaintiff, for his signature, a certain paper in substance as follows:

"NEW YORK CENTRAL RAILROAD,
"*Buffalo Station, June* 5, 1858.

"Memorandum of an agreement made and concluded this day by and between The New York Central Railroad Company of the first part, by their station agent at the above-named station, and C. Lockwood,
12 of Stamford, Connecticut, of the second part, witnesseth:

"That *that* whereas the New York Central Railroad Company transport cattle, horses, hogs, pigs, sheep, lambs, calves, or other live stock only at first-class rates, as per tariff, except in the following cases, viz: where they transport them at a reduced rate in consideration that the owner or ship'er assuming certain risks, as specified below: Now, in consideration that the said railroad company will transport for me such live stock at the reduced rate of seventy dollars per car load, or cents per 100 lbs., the said C. Lockwood does hereby agree to take the risk of injuries which the animals or eith' of them may run in consequence of any of them being wild, vicious, unruly, escaping or maiming themselves or each other, or from delays, or in consequence of heat, suffocation, or other ill effects of being crowded either upon the cars of the company or on account of being injured by the burning of hay, straw, or other material used by the owner for feeding the stock or otherwise. and for any damages occasioned thereby, and also all risk of any loss or damage which may be sustained by any delay in such transportation, it being understood that previous to loading the owners are required to examine the cars and to take all risks against accidents that may happen in consequence of insecurity (if any there may be) in the floor or the doors of the cars; and it is further agreed that the said C. Lockwood is to load, transport, and unload said stock at his own risk, the said New York Central Railroad Company furnishing the necessary laborers to assist. And it is further agreed between the parties hereto that the persons riding free, to take charge of the stock,
13 do so at their own risk of personal injury from whatever cause.

"And this agreement further witnesseth that the said C. Lockwood has this day delivered to the said railroad company two car loads of cattle to be transported to W. Albany on the conditions above expressed.

"E. CLARK, JR.
"*Station Agent.*
"CHARLES LOCKWOOD."

And did also then and there cause to be prepared and presented to the said plaintiff for his acceptance a certain ticket in substance as follows, viz:

"NEW YORK CENTRAL RAILROAD,
"*Stock Drovers Pass, June 5th,* 1858.

"Good only on stock train to Albany of this date.

"I certify that the bearer, C. Lockwood, has shipped on behalf of himself the quantity of stock which entitles him to pass free to W. Albany. The conductors of the train on which this stock is carried will therefore pass the bearer at his own risk to W. Albany, taking up this pass before arriving at the place of destination.

"The acceptance of this pass is to be considered a wa'ver of all claims

against this railroad company for personal damages and injuries received when on the above train.

"E. CLARK, JUNIOR,
"*Station Agent.*

"Issued by the New York Central Railroad."

And the said plaintiff says that the said defendants well knowing that the cattle train which they were then about to start from said Buffalo for said West Albany, (of which said two cars containing said
14 cattle of the said plaintiff were to constitute a part,) would, in due course, arrive at said embankment during the night then next ensuing; and well knowing that the grade of said road at said place was, and at all times had been, unnecessarily severe and difficult, and substantially impracticable for the train aforesaid, and well knowing that the engine which they were about to employ and did employ on said train, might and would prove inadequate to take the same up said grade and over said chasms therein; and well knowing that on said occasion the said plaintiff would be likely to get off from said train on to said road, and to pass on and along the same to the cars containing his cattle as aforesaid, for the purpose aforesaid, and that the said plaintiff might and would, from the *cour*se aforesaid, be greatly endangered in life and limb; and well knowing that the said train was, by reason of the facts aforesaid, about to be run rashly and presumptuously, and with a reckless disregard of the safety of the plaintiff and other passengers on the said train, did, then and there, by withholding from the said plaintiff all knowledge of any and all said facts, and by causing the said plaintiff to believe, contrary to the fact, that on said journey or transit he would be exposed to no other than the common or ordinary danger attending railroad travelling, falsely, fraudulently, and deceitfully persuade and induce the said plaintiff to sign the said paper first herein before recited, and to accept and take of and from them the ticket aforesaid, and to engage and take passage for himself and for his said cattle on and over said road as aforesaid, and to pay them therefore, the consideration aforesaid.

15 And the said plaintiff says that having paid to said defendants the amount aforesaid, and his said cattle having been placed on said train, and in two of the cars thereof, he, (the said plaintiff,) with his said cattle, did thereon leave said Buffalo for said West Albany, on the said fifth day of June, at about ten o'clock in the forenoon, and they, (the said defendants,) did, on the arrival of said train at the city of Syracuse, in the county of Onondagua, on the evening of the same day, to wit, at about ten o'clock in the afternoon cause the same to be rearranged and other cars to be combined and united therewith, and soon thereafter they, (the said defendants,) caused the said train, with the said plaintiff and his said cattle thereon to leave said city of Syracuse and proceed on said road in the direction of said West Albany.

And the said plaintiff says that the said train, with the plaintiff and his cattle, arrived at said embankment during the same night, that is to say, on the 6th day of June, at about two o'clock in the forenoon, and that they, the said defendants, did then and there, that is to say, in the night season, and when it was extremely dark, by wrongfully constructing their said road as aforesaid, and by wrongfully employing on said train an engine inadequate and insufficient in power, and wrongfully overloading the same, rashly, presumptuously, and with gross carelessness, cause the same to be arrested and stopped on said embankment, and over said chasms or openings in and through the same, and the said

plaintiff and his said cattle to be then and there detained for a long space of time, to wit, for the period or space of six hours, to his great inconvenience and *and* damage, well knowing that the said
16 plaintiff and other passengers in said train, might and would be exposed during said detention in passing and repassing on and over said road for the purpose aforesaid, to great & imminent peril of life and limb by means of said chasms or openings in the embankment aforesaid.

And the said plaintiff says that *that* the said defendants then and there wholly neglected to give to the said plaintiff any notice whatever of the existence of said chasms or openings in said embankment; from the cause aforesaid the conductor or engineer thereof commenced backing the same down the grade and embankment aforesaid, and then rushing the same forward suddenly and with great force and violence with intent to gain thereby sufficient power to overcome said grade and to take said train up the same and over said canal, and did continue such irregular effort and violent action thereat for a long space of time, to wit, for one hour, and did thereby jerk off their feet and throw down in each of said cars, several of the said plaintiff's cattle, and several other of said cattle did lie down therein; and the said defendants then and there, while such action was going on, did, by one of their servants and agents, inform the said plaintiff and give him notice that some of his said cattle were down in said cars and required attention, and thereupon it became and was necessary and proper for him to get off from said train and to pass on and over said road to his said cattle in said cars for the purpose aforesaid, which he (the said plaintiff) having no knowledge or notice of the existence of said chasms, nor of any of them, attempted to do, and while in said road passing forward in the dark toward his said cattle with the license and by the consent of the
17 defendants, he (the said plaintiff) was, solely by means of the **gross negligence and carelessness of the said defendant and** their rash and presumptuous conduct as aforesaid, and without any fault or negligence on his part, thrown and precipitated headlong into one of said chasms or openings, to wit, into the one nearest to said canal, whereby his head, brain, and spine were greatly bruised, contused, and injured, and he was greatly lacerated, wounded, and injured in and about his face, neck, back, breast, arms, legs, and divers other parts of his body, and rendered wholly insensible for a long space of time, to wit, six hours, and whereby he was nearly suffocated and drowned while lying insensible as aforesaid in said chasm and on the bottom thereof by a stream of water running through the same, and which in fact flowed on and over his face and head, and whereby he sustained great pain and distress from thenceforth hitherto, and whereby his life was greatly endangered, his health undermined and destroyed, and himself rendered incapable of attending to any business whatever.

And the said plaintiff says that they, (the said defendants,) did then and there, rashly and presumptuously, in and by means and proceedings aforesaid, cause said train to be arrested on said embankment, and the said plaintiff and his said cattle to be stopped and detained as aforesaid, and the said plaintiff to be thrown and precipitated as aforesaid into the chasm or opening aforesaid, and the said wounds and injuries to be inflicted on said plaintiff as aforesaid.

And the said plaintiff says that by means of the premises he has been rendered from thenceforth wholly incapable of pursuing his lawful
18 business, to wit, that of cattle drover, and hath been deprived of all the profits thereof which were and would have been but for

the cause aforesaid, not less than twelve hundred dollars annually, and he hath, moreover, been compelled to expend, and hath necessarily expended a large sum of money, to wit, the sum of one thousand dollars, for medicine, medical and surgical attendance, nursing, boarding, lodging, travelling, and other expenses by and in consequence of the wounds and injuries received by him as aforesaid. All of which is to the amount and sum of twenty-five thousand dollars, to recover which and costs this suit is brought.

And on the same day, to wit, on the first day of the term of said circuit court of the United States for said southern district of New York, in the year of our Lord one thousand eight hundred and sixty-three, in the city of New York, came The New York Central Railroad Company, the defendants, by their attorney, Sidney T. Fairchild, esq., and brought into said court before the aforesaid justice thereof, their certain plea and answer to said declaration; which said plea follows in these words, that is to say:

United States circuit court for the southern district of New York.

CHARLES C. LOCKWOOD, PLAINTIFF,
against
THE NEW YORK CENTRAL RAILROAD COMPANY, defendant.

19 And the said The New York Central Railroad Company, by Sidney T. Fairchild, its attorney, comes and defends the wrong and injury whereof, and says that it is not guilty of the said supposed grievance above laid to its charge in manner and form as the said Charles C. Lockwood hath above thereof complained against it; and of this the said New York Central Railroad Company puts itself upon the courts.

S. T. FAIRCHILD,
Defendant's Attorney.

And the said plaintiff doth the same.

By TRUMAN SMITH,
His Attorney.

And the issue in said case thus joined by and between the said plaintiff, and the said defendant having come to the term of said court, holden at the city of New York, on the third Monday of October, one thousand eight hundred and sixty-three, it was ordered by the same that said issue be tried in and before said court, at the court-room in the city aforesaid during the same term, to wit, on the eighth day of November, in the year last aforesaid, on which day and at which place before the Hon. David A. Smalley, United States judge in and for the district of Vermont, then holding said October term of the circuit court of the United States for the said southern district of New York, by the appointment and direction of the Hon. Samuel Nelson, justice, according to the form and effect of the statute in such case made and provided, came as well the above-named plaintiff as the above-named defendants, by their respective attorneys above-mentioned, and the jurors of the jury summoned to try the said issue being called, also come, who, to
20 speak the truth of the matter aforesaid, being chosen, tried, and sworn, say, upon their oath, that the said defendants are guilty of the grievances laid to their charge in manner and form as the said

plaintiff in his said declaration hath complained against them; assess the damages of the said plaintiff, by means of the premises, over and above his costs and charges by him in this behalf expended, at twenty-five thousand dollars.

And the said issue, with the verdict aforesaid, having come to the said circuit court of the United States, holden in the said city of New York, for the district aforesaid, on the third Monday of October, one thousand eight hundred and sixty-nine, at the court-room thereof, before the Hon. Samuel Nelson, justice, holding said court, according to the statute in such case made and provided, came as well the said plaintiff as the said defendants, by their respective attorneys above mentioned, and having been heard by said court, on the application of the said defendant for a new trial, it was by said court considered and ordered that a new trial be granted in said case on payment by the defendants to the plaintiff of the costs and charges incurred by him in the trial aforesaid, which the said defendant then and there paid to the said plaintiff, and thus the same order became absolute.

And the said issue, joined by and between the plaintiff and the said defendants, as aforesaid, having come to the term of the said circuit court of the United States for the district aforesaid, holden at the court-rooms thereof, at the city of New York, on the first Monday of April,
21 anno Domini one thousand eight hundred and seventy, it was ordered by the same that said issue be tried in and before said court, at the court-room in the city aforesaid during the same term, to wit, on the sixth day of April, in the year last aforesaid, before the Hon. Lewis B. Woodruff, circuit judge for the second circuit of the United States court, holding said October term. Came as well the above-named plaintiff as the above-named defendants, by their respective attorneys above-mentioned, and the jurors of the jury summoned to try the said issue being called, also came, who, to speak the truth of the matter aforesaid, being chosen, tried, and sworn, say, upon their oath, that the said defendants guilty of the grievance laid to their charge in manner and form as the said plaintiff in his said declaration hath complained against them, and they assess the damages of the said plaintiff, by means of the premises, over and above his costs and charges by him in behalf expended, at fifteen thousand dollars.

And the said issue, with the verdict aforesaid, having come to the said circuit court of the United States, holden in said city of New York, for the district aforesaid, on the third Monday of October, anno Domini one thousand eight hundred and seventy, at the court-room thereof, before the Hon. Lewis B. Woodruff, circuit judge, holding said court, according to the statute in such case made and provided, come as well the said plaintiff as the said defendants, by their respective attorneys abovementioned, and having been heard by said court, on the application of the said defendants for a new trial in said case, it is now, to wit, on the tenth day of December, of the year last aforesaid, during the
22 same, by said court considered and ordered that said application be dismissed.

Therefore, it is considered that the said plaintiff, Charles C. Lockwood, do recover of the said defendants, The New York Central Railroad Company, his said damages by the jurors aforesaid, in form aforesaid
$15,000 assessed, to wit, the sum of fifteen thousand dollars, and also
1,132 12 eleven hundred and thirty-two dollars and twelve cents for his
$16,132 12 costs and charges by the said court now here adjudged of in-

crease to the said plaintiff, and with his assent, which said damages, costs, and charges, in the whole, amount to sixteen thousand one hundred and thirty-two dollars and twelve cents, and the said defendants in mercy, &c.

R. E. STILWELL,
Deputy Clerk.

(Endorsed:) U. S. circuit court S. D. of N. Y. Charles C. Lockwood vs. The N. Y. Central R. R. Company. Judgment roll. Truman Smith, att'y for pl'ff. Filed March 14, 1871.

23 *Bill of exceptions.*

Circuit court of the United States for the southern district of New York

CHARLES C. LOCKWOOD
vs.
THE NEW YORK CENTRAL RAILROAD COMPANY.

Afterwards, to wit, at the day and place within mentioned—that is to say, on the sixth day of April, 1870, before the Honorable Lewis B. Woodruff, circuit judge of the United States for the second circuit, came as well the said Charles C. Lockwood, plaintiff, by Hon. Truman Smith, his attorney and counsel, as the said The New York Central Railroad Company, defendants, by S. T. Fairchild, esq'r., their attorney and counsel, and T. R. Strong, esq'r., as their counsel, and the jurors of the jury, of whom mention is within made, being called and sworn to try the said issues within joined, the said plaintiff, by his said attorney, and the said defendant, by *their* said attorney respectively, offered and gave evidence as follows:

CHARLES C. LOCKWOOD, sworn, examined by Mr. Smith, counsel for the plaintiff, testified:

24 I am the plaintiff, and live in Stamford, Connecticut. My business is that of a cattle drover—cattle dealer. I shipped two car loads of cattle at Buffalo. I have been in that business since I was 21 years of age. I am 46. I lacked a little of 35 years of age at the time of the occurrence. I shipped two car loads of cattle on the New York Central Railroad for West Albany, at Buffalo, in 1858, the 5th of June. After loading the cattle I went down to the office, about a quarter of a mile, (I never shipped cattle there before,) to give them information as to who I wished the cattle billed to, and to get my pass. When I got down there and gave them the desired information, they filled out a blank, and pushed it to me to sign. I saw it was a stock arrangement, which was the heading of it, and I signed it. I supposed it was necessary, and they filled out a drover's pass, and I took it and went back to my cattle. I think it was along 10 or 11 o'clock. I don't recollect exactly the time when we left Buffalo for West Albany, and nothing unusual took place except making up the train at Rochester, until, if I recollect right, about 2 o'clock, of June 6th, the train was stalled,
25 and, after a minute or two, the conductor got up and went out; and finally, after a few trials of the jerking process, they gave up the idea of getting up the grade. One of their brakemen, or, at least, I supposed he was a brakeman, for he was on the train doing the duty of a brakeman, *he* came in with a lantern, and said the cattle were down.

(The counsel for the defendants thereupon objected to the witness stating what the brakeman said, on the ground it could not affect the

R. R. co. The counsel for the plaintiff here produced to the court the agreement and ticket set forth in the declaration in this action, and the counsel for the defendants admitted that said agreement was executed by the plaintiff and defendants, and that said ticket was issued by the defendants to the plaintiff, as stated in the declaration; and thereupon the plaintiff's counsel read the same in evidence, and claimed that the statement of the brakeman was admissible under said agreement, to which the counsel for defendants objected, for the reasons before stated. The court overruled the objection, and the defendants then and there excepted to the decision.)

26 The witness further testified: He said the cattle were down, and needed attention. He said the cattle in one car were badly down, and in a dangerous condition, and the question was asked by one of the drovers what was the number of the car, and he said he could not tell. They asked him what part of the train it was, and he said near the centre. I said to Mr. Kelsey, who had cattle on the same train, "That is one of our car loads of cattle." We got up and went out, and when we got down on to the grade it was so dark I said, "I will go back and get a lantern," and I went back into the caboose and I took up a light that was standing in the caboose, and this man, the brakeman, caught hold of my arm and said, "You cannot have that light, I am going out as soon as I fix my lantern;" and he went out, and Mr. Kelsey followed him, and I followed Kelsey, and we came to Kelsey's cattle first, and he stepped out to see if his cattle were down, and I stopped a moment to see if they were down, and I followed along.

27 The light of this man's lantern shone on the side of the cars, so that I could see the numbers of the cars, and I knew my numbers, and going along I pitched into this place, and that is the last I knew about the cattle; and when I came to my senses I was at Canastota, at a public house, near the track. I was obliged to remain here some three weeks. I had letters on me showing where I belonged, and they telegraphed to my friends, and they came up and took care of me. I was there about three weeks, and for four years after I never earned a stiver at anything, and I have not earned half a living since. I remember falling in and striking my head against something, and that is the last. I have, since I was injured, seen the opening into which I fell. It was the first opening west of the bridge—I should judge 40 or 50 rods from the bridge. I was present when my cattle were put into the cars, which was done by their employees—men they employed for that purpose. When I looked at this opening I should judge it was from 19 to 20 feet in depth; the walls each side incline from the top back. I believe there is a projection for the purpose of having braces run from the wall into the stringers that the rails

28 were laid on. The walls were not exactly perpendicular, but the major part of the way, I should judge, they were. There was no bridge upon that opening in the road—nothing only stringers. I mean by stringers timbers laid lengthwise to the track to lay the rails on. There are no cross timbers or ties.

Q. Will you state how you were injured? I don't mean the cause of the injury, but what part of your system was injured?

A. Well, sir, my whole nervous system was shattered. I could not see anything for a year, natural; there was a blurness, no natural view. I used to go out and sit under a tree in my father's yard, and look at the top of another in order to get a natural view. I used to practice it, and finally I got a natural view of the top of the tree—that is, the natural color of the leaves; and now, looking down I cannot measure the

distance. I was sitting in a chair, and could not raise my feet for months, not ten inches from the floor; when I undertook to walk it was a shuffle. I seemed to have lost the use of my limbs and this
29 arm. I had a pain in my head. I don't believe there was any time for four years but I had a pain in my head; I have more or less of it now—noise and confusion trouble me now. If I wish to get over anything, if it was high enough for me to get my arms like that, I could roll over a fence or anything like that—I could not use my legs. I am a little better as to that now, but my nervous system is all shocked. It is so with my lungs that, if they laid me on my left side I would strangle—I could not breathe. If they laid me on my back that was the easiest way for me to lie in order to breathe; and I had a sore, and a physician said I vomited blood. I had a sore spot in this lung, and I fancied it was going to break on the outside. It grew worse and worse, and in the month of August I was tak*ing* with coughing. This was in 1858 I was taken with coughing, and I raised bloody mucous matter, and the nearest I could compare it to, it tasted like the smell of rotten eggs; as to what it was I could not tell. I judge of the
30 facts. When the weather is bad it effects me. If I take a little cold it affects that lung. There is a sore spot there. If I am called upon to use any exertion in that lung it troubles me now. My thinking powers were very much injured, but I am improved. I cannot think quite as rapid or quick as I formerly could, but after a time I can come around. I am not able to pursue the cattle business. I had no other business. I own a small farm, about 40 acres—a rough farm. For the first four years after this injury I was not able to earn anything whatever. Now my eyesight is bad, especially when I look down; but confusion or exertion for any length of time troubles me. There is a double vision and a blurness. The sight of this left eye there are black spots floating, and unless I use exertion to squint, or something of that kind, I cannot see good. My nervous system was good, but it is shattered—all gone. I am not able to pursue the cattle business now, as a business. I have purchased a few cattle. In 1862 I bought one car load of cattle, at Albany, and the latter part of the season
31 or summer I bought two in Jefferson County. I had some business to look after up there, and since then, I have possibly for two seasons gone up to Albany and bought 4 or 5 car loads during each, but those two years back I have not bought anything. My health before this happened was first rate.

(The counsel for the plaintiff then proposed to prove by the witness that, at the time he executed the contract and received the "pass" read in evidence he (the witness) did not know that the defendants had established or pretended to charge any higher rate for the transportation of cattle from Buffalo to West Albany than $70 per car load, to which evidence the counsel for the defendants objected as incompetent and immaterial; but the court overruled the objection, and defendant's counsel then and there excepted to the decision.)

The witness then testified as follows:

"I did not know anything about any higher rate than $70 a car load. When I went up to get my pass they did not say anything to me about any higher rate."

The witness was then cross-examined by Mr. Fairchild, counsel for defendants:

I bought these cattle at Chicago. I shipped them at Chicago. I

32 had a free pass over the road from Chicago to Buffalo. I do not know whether it was similar to this or not. It was a free pass I had on the stock train to look after my cattle. I understood before I got to Buffalo that I would have to be there sign a release. I heard the drovers talking about it. I cannot tell exactly at what place. A drove of drovers came all the way down from Chicago. I presume there were half a dozen of them. I paid nothing separately from the $70 per car load for my fare on the defendant's road unless taking care of my cattle be deemed such. I had been in the cattle business ever since I was 21 years of age. I used to buy the store cattle mostly in the summer season, and fat cattle in the winter season. I have shipped cattle. I shipped four or five lots, I guess, in Jefferson County as far as Albany. It was previous to my injury; I cannot tell you the year. I used generally to drive them through. I used to buy store and fat cattle, and thought I could drive them through cheaper than I could ship them. It was a common mode of handling store cattle. We used to have a mixed lot of cattle, fat and store together.

33 This was the first lot of cattle that I shipped from Chicago to Buffalo. I shipped about 5 lots of cattle on the Rome and Watertown Railroad, and from Rome through to Albany, and this lot of cattle I had when I was hurt was the only lot of cattle I shipped from Buffalo. I never shipped a great deal of cattle. Winters I buy fat cattle around our section and bring them to this market. I think we sued the company for this injury in 1860 in the State courts. The motion for a new trial was made in this case something over a year ago. This case was tried before, I think, in 1866. I have been to Albany a few times, and only a few times since my injury; but for two years back certainly, or three, I have not bought any cattle at all. I have got a little place up there of 40 acres. At the time I got out of this train it was dark. It was so dark that I could not see. I would not undertake to go on the track. I went back into the car for a light, because it was so dark. I never was on the road before with a lot of cattle. When I got out, and it was so dark, I said to Mr. Kelsey: "I will go back and get a

34 light." I went back to get a light and that was refused me. After that I did not go until that brakeman went out. I don't know who he was or what his name was. He told me he was going out. At the time when I fell into this opening I was looking up to see the numbers of the cars. I did not look to see where I was walking.

Q. How wide is this opening?

A. I should judge the opening was about 16 feet wide. I cannot tell. It may be no more than 15. It was wide enough for a wagon with a load of hay to be drawn through; but I don't imagine many loads of hay go through there by the look of the bottom. I don't know whether it was a farm crossing. I am told there were three openings of this kind. I don't know anything about it. I should judge it from 40 to 50 rods to the canal bridge; that was high enough to let the horses go under it and boat. I suppose the grade through which this opening was cut is a grade which carries the railroad over the canal, built for that purpose, I presume.

The witnesss was then re-examined by the counsel for the plaintiff, and testified:

I had no notice that there was any danger in that place. I fol-

35 lowed on after the man having the light. The light reflected on the cars so that I could see the numbers. I had not come to my cattle. As I moved along the road I looked up by the light to see the numbers.

The witness was then recross-examined by defendant's counsel.

I don't know anything about my cattle having been injured. I never heard they were injured by being down, or in any other way.

NATHANIEL E. HAIGHT was next sworn on behalf of the plaintiff as a witness, and examined by the plaintiff's counsel, and testified:

I am acquainted with the plaintiff in this case. I was acquainted with him before he sustained this injury. His health before was good—very good. I never knew him sick before, and I have known him for forty years. I was called on to see him after he came home from the West, which was in the latter part of the summer. I don't remember the month exactly that I was called on to see him; it was in the latter part of the summer, however. I think it was in 1858, as near as I can recollect. It might have been July or August—I cannot tell; but
36 it was warm weather. I found him suffering from what I presumed to be a concussion of the spinal marrow and brain, which affected his whole nervous system, and he was suffering from headache and obliquity of vision. He could not see without a great deal of effort, and it seems he had labored under what we might call an obliquity of vision. He could not get the angular vision right, and he would often see, a little way off, two heads, one right by the side of the other. He had a headache and a severe distress in his neck, and was very feeble, and when he did walk he walked like a very old man, and went very careful, and he was unable for four or five years, as near as I can recollect, to pursue any business or to follow any occupation. I never gave him much medicine, for I concluded his recovery would be a work of time. That his difficulty originated from this shock or concussion, or whatever you may call it. He might have fallen on his head; I cannot tell, and for four or five years he was unable to do anything, and he has done but very little since. I see him often, and often meet him in the streets—across the street, where it is pretty wide—and he does not recognize me until I speak to him. He has a difficulty in his
37 vision which affects him now very much unless he is close to you.

Q. How was it in regard to his lungs?

A. He complains of his left lung, I think it was; I don't know; I did not see him. At that time he had, from a description, what I should think an abscess of the lung—bloody matter, and, from the feted smell of it I should judge it was an abscess; and for the last four or five years I have kept no watch of him, but I have seen him weekly perhaps. He comes to the village once or twice a week, or twice a fortnight, and he goes about, but he has never labored much, I don't think, for four or five years. I don't think he is able to do any manual labor, to lift, or where it requires muscular exertion; I don't think he is able to do it. There is no probability of his getting well, he has been so long sick. I don't think he has improved much the last few years; he has come to a standstill.

Mr. Smith here read the direct examination of Solomon Kelsey, taken on the former trial, as follows:

Mr. Strong read the cross-examination.

38 SOLOMON KELSEY, a witness on behalf of plaintiff, being sworn, testified as follows:

Examined by Mr. Smith, counsel for plaintiff:

I reside in Illinois, the northern part, thirty-five miles from Chicago.

I used to buy cattle, and ship them. Five years back I have been farming. I was on the train with Mr. Lockwood. We shipped the cattle at Buffalo; I think it was June the 5th, 1858. The train started out not far from eleven o'clock; I don't recollect; between ten and eleven o'clock. Then we came on down along, and they made up the trains at Rochester—I think the bridge train—and I am not certain that it is Rochester; I think it is Rochester. Then they came down to Canastota, where the train stalled. The train stalled at this place, near Canastota, and we stopped there a spell, and they backed and started a number of times; took slack on the train, and started a number of times, and finally there was a man came in at the door with a light, and *notified us that the cattle were down in the car. Mr. Lockwood spoke, and says he, "In what part of the train are the cattle down?" and he spoke and, said, "They*
39 *are down in the car above here, and need attention;" and Mr. Lockwood spoke and said, "What part of the train is this car in?" and the man spoke and said, "About the centre, I should think."*

(Defendant's counsel objected to this in italics, that it cannot effect the def't, and as incompetent and immaterial. The objection was overruled by the court, and the defendant's counsel excepted to the decision.)

And Mr. Lockwood then spoke to me and said, "Kelsey, that is about where our cattle are," and then we started to go out, and went out of the door. It was pretty dark, and then I spoke and said, "Let us go back, it is so dark," and he said, "No; let us go on; I will go back, and get a light;" and he went back in the car, and I went along, and staid till he came up, and we passed along the grade till we came to where my cattle were; and I had a long pole that I used for shipping cattle, and I ran it into the car along underneath, as I could tell whether our cattle were down or not; and I spoke after I got along by my cattle, and I said, "My cattle are all right," and he didn't answer me; and I spoke again. I knew he was close to me, for we had been talking all the time, and he didn't answer; and I hallooed a little louded, and he didn't
40 answer; then I began to look for him. I knew he was within hearing, and I went along to this hole. I seen there was a hole down there, and I followed along up the side, and felt my way down there, and felt around and found it, and then I knew for certain he was in there; and then I went back, and spoke to the boys, or to the one who had the light, and we went back and found him. I mean by "boys" men on the road; they were employed men of course. They had lights, and we found him down in there; and I guess I got the light; I know I got a light, and went back, and found him lying in a little ravine, in the middle of this place, with his head down in the water, and the water running over his head partially; and I pulled him up a little, and by that time there was a number there, and they took him and carried him up. I don't recollect who did carry him up now. He lay down in this little ravine, this little water-course in this spot where he lay, and the water was a kind of running over his face; he appeared to be senseless; he didn't breathe when I took him out for a moment
41 or so, and then he began to gasp for breath, and froth and water and a kind of blood ran out of his mouth. He was taken, then, and carried back into the car, and taken to Canastota. I think one of the men carried him up from down there; I won't be positive; he carried him up; he carried him up to that embankment, and put him back into the car. I should think it was somewhere near eleven or twelve o'clock, somewhere near thereabouts, in the night; it was rather a dark night, I should think; I should guess not any moon. I thought it was one of the employees of the company came in and gave notice that the

cattle were down, and required attention; it was a man with a light, a man on the train. When he came into the train, and gave the notice, he went up and began to fix the light; it was out of repair, and he went there to fill it with oil, or prick up the wick; it didn't give good light. I suppose that was what he came back for; he turned and went back up towards the end of the train; he was forward. I did not see any one take up the light and attempt to carry it away. I think he went out when we did. I went out a little first. I think before he got his
42 light finally fixed we went back, and we all went out together; he was a little ahead after he got started out on the track. I could not tell who went next. We went both along, not far apart; we were talking along. When I got up about where I thought my cars were, I lighted a match on the side of the car, and looked at the numbers; I knew our numbers, and knew how many cars I had. My cattle were not down that I knew of; I could not tell positively. I ran my pole in along, and I could not feel any down. Mr Lockwood had disappeared. I went up along apast where I supposed he was, and followed along; I could not see distinctly; it was pretty dark. I found him in this place. I did not know before I found him what had become of him. I felt along with my pole; I didn't know but that the cars, backing and starting, might have run on to him. I followed up along one car, I guess, or so; I followed along with my pole; I kept the pole, and looked ahead of me so as to be sure not to get into such a place. I don't think I could see that opening in the road; I don't think I could tell
43 distinctly what it was. I think there were timbers put along lengthwise, and rails on them, I think, at that time. I think there were no ties there then; I think not any boards laid; I guess not. I don't know what this opening in the road was for; I could not tell how high that embankment was.

Q. About how deep was that gulf?

A. We looked at the opening that night after we got down there; it was dark and I could not tell; I could merely guess, and that is all; I think somewhere from fifteen to twenty feet deep, probably; I could not tell in the night; I don't think the plaintiff breathed till after I drew him upon the bank a little; he then kind of began to gasp for breath; we thought he was dying; when he came to, he had no senses at all; we had been on that embankment before I and Mr. Lockwood went out, I should think, ten or fifteen minutes, probably; I could not tell; I had no time; they were running back together up the slack, probably three or four times; in order to secure the benefit of this slack, they put the brake on the hind car; jog it up some way, I suppose, after they
44 had suffered the train to run back so as to get the benefit of this slack; the next movement was, they put on the steam and started ahead, and try to draw the train; the back end of the train yanks pretty bad; the first part of the train won't yank as bad as further back will; the effect that would have on cattle is, it jerks them down once in a while; he could stand up in the caboose; it sometimes would yank him; he could stand up without holding; he could if he was guarding against it, of course; I think they had been yanking them some four or five times before they had one lot of cattle down; I could not tell how long we were detained on the embankment; it seemed, probably, longer than it really was; after he was hurt, and we had got him into the train, we were pretty anxious to get him away somewhere, and we had to wait a few minutes; I could not tell how long; I should think, probably, quarter of an hour; I think the train came behind us and pushed us up that grade; I could not tell how long that train was; there was

45 more than a dozen or two dozen cars; I don't know how long the train is generally; I know there was quite a train; I could not tell how long that train was; I should think there were as many as twenty-five cars; I had been travelling over this road with cattle before this accident occurred, two or three years, I guess; had been stalled there on that road before, I guess, once or twice; once, I think, they cut the train in two, drew part of it up at a time, and went back for the other part; I don't recollect what they do at other times; sometimes they go up one way and sometimes another; sometimes they will back and take slack once or twice, and pull off and go along themselves; I could not tell for certain any particular time; that depends on how they go; sometimes they will take the slack and go right along, and sometimes they go very slow and draw it over without any stopping; sometimes they would seperate the train and carry part of it to Canastota, and then come back and take the rest; I was awake when the man came in and gave notice that the cattle were down; he did not give any notice that there was any danger on that road; he did'nt say anything any more; I could not tell how many cars were in the
46 train when we started from Buffalo; they always re-form the train at Rochester; I don't know whether they did so at that particular time or not; they always used to make up the train there; I mean, bring in additional cars to it, and re-form the train; I don't know what they do call it; they fix up the train there; I know the Bridge stock and the Buffalo stock comes in there, and they make up the train to suit themselves; I had then on that road cattle, I don't recollect how many, I had more than one car load.

The witness was then cross-examined by Mr. Fairchild, counsel for defendants:

Q. Did it rain that night?

A. Well, my impression is that it did'nt fairly rain, it was a kind of a dark night, and rather a kind of a fog or mist, I think, but I would not be positive; that would be my impression, but I would not swear positively.

Q. How many cattle trains were there in that neighborhood with yours and the one that was following?

A. Well, I don't know whether it was two or three; I could not tell; sometimes it was two, and sometimes three.

47 Q. On this occasion?

A. I could not tell, there were two certain, but whether there were more or not, I could not say.

Q. The engine that pushed you up over the grade was one that was following the cattle train?

A. I don't know certain about how long these trains were apart, I could not tell that; I said had been engaged in this business of driving cattle previous to this time, probably two or three years; I have always been engaged in driving cattle, but not shipping them from Chicago, that is ever since I have been large enough; how many times I have been stalled on this grade previous to this, I could not say positively; I could not tell you; once or twice I have; I could not say distinctly how many times; how many times I had shipped cattle over the road, I could not tell; we were at it constantly during that time, sometimes we went every week, and sometimes once in two or three weeks, or in a month or two, just as we happened to buy; we had no other business at that time.

Q. Had you ever been stalled there in the night time before?

48 A. It was always in the night when we were stalled there.

Q. Who went out of the car first that night?

A. Mr. Lockwood and I went out; I guess I stepped off on the platform first; we went on up about together.

Q. Who went out with the light?

A. That was the man that came in and notified us.

Q. Did he go out ahead of you, or after you?

A. I think he was in fixing his light when I stepped out to the door.

Q. Was he fixing his light when Lock*ford* went out?

A. When he went out to the door, I think.

Q. Did I understand you correctly when I understood you to say that you and Lockwood first went out together, and then he went back into the car after a light?

A. We went out to the door, out to the edge of the car, and then he went back for the light; it was pretty dark, and he said he would go back and try to get a light; we got out on the right-hand side of the train; walked along between the tracks or upon the grade; I don't know whether it was between the tracks, or how close to the cars.

49 Q. Do you know whether you walked between the tracks, or on the side of the tracks?

A. I could not tell; it was as close to the cars as we could walk along handily. I think there is a double track there, but I don't know positively.

Q. By the COURT. On which side of the car did you get out?

A. On the left-hand side going east.

Q. By Mr. SMITH. The train' going east go up on the south track?

A. I don't recollect as to that.

Q. By the COURT. The right-hand track, is it not?

A. I don't recollect; it is my impression it does.

Q. By Mr. FAIRCHILD. Do you know how the man with the light got across this roadway?

A. I do not.

Q. By the same. He did get across?

A. Well I suppose so.

The witness continues: I could not tell how many drovers there were upon this train; there were six or eight, probably, or ten; may be more, or may be less. There was quite a number. I know they did not all get out.

A. Mr. Lockwood and I got out this time.

Q. Was that all?

50 A. I don't recollect as to that. On this occasion, when we were standing there during the whole time, they got out, all of them, pretty much. After he was injured, they were all up there, almost. When I went back and notified them, then I guess they pretty much all came out.

Q. Did any of them get out before you went back and notified them that he had fallen into this roadway?

A. That I don't know.

Q. You say there was sixteen, or eighteen, or twenty feet down to where he was?

A. I should think so. It was in the night time, and I didn't measure it.

Q. How did you get down there?

A. I went up on the upper edge and felt my way down on the upper edge of the mason work. I went down the stone wall. I did not have a light when I went down first. I found his hat down in there; did not

find him at the same time. I have been to this place since then in the day time. I didn't notice it in particular. I have rode over it there a good many times since.

Q. What is it, a farm crossing?

51 A. I don't know what it is intended for; I suppose it is. That is what I have heard: I have heard it was, but I don't know positively. How far *was it* from the canal bridge could not tell. I never measured it. It is not a great way, I know; I have rode along; I should think it was forty, sixty, or eighty rods: I could not tell. I rode along in the train; I know it is but a little ways; I never measured it. I did carry a lantern sometimes to see to our stock. Some drovers generally carry lanterns and some don't. I don't know whether I have ever been upon a passenger train that was stalled at this place, or any place.

Q. Were your cattle down upon this occasion.

A. I could not tell. I could not feel any down with my pole, as I stated before, but I could not tell positively. I have had cattle yanked down by this process. I don't know whether I had there or not. I have had them yanked at a good many places; various places along the road; all the roads between here and Chicago.

Q. Is this process then of backing up, taking a slack, and then starting up again—is it the usual way of starting a train when it is stalled, as far as you know?

52 A. I don't know; it is the way they do sometimes, I guess.

Q. It is not the usual way?

A. I don't know that it is. I don't know their rules.

Q. As far as you know, is it not the way they usually do on all the roads?

A. I don't know whether it is or not.

Q. You know whether it is, as far as you know, don't you?

A. I said, in the first place, that they did sometimes start that way.

Q. Upon all the roads? You say you had cattle yanked down by these places on other roads all the way to Chicago; were your cattle injured upon this occasion?

A. Not as I know of. I didn't see the cattle afterwards.

CHARLES C. LOCKWOOD, recalled, was examined by Mr. Smith, counsel for plaintiff:

Q. Which side of the cars did you get out on to that road?

A. The left-hand side.

Q. When were your cattle loaded into the cars in reference to the time at which you applied for your pass over the road?

A. Previous to the time.

53 Cross-examined by Mr. Fairchild, counsel for defendants.

The witness testified: It is a double-track road at this point where this accident occurred. I walked along between the two tracks.

Q. Suppose the train had come along at the time from the east; would it be safe for you to have stayed there between the two trains?

A. I don't know. I don't know how close the cars came together. It might have been, and might not; but I should have tried to look out for myself. I don't know whether it would be safe or not.

Q. How wide apart are the tracks?

A. Wide enough for two trains to pass without interfering with each other.

Mr. Smith, counsel for plaintiff, read the direct examination of Samuel Sidney, taken on the former trial, as follows. Mr. Strong, counsel for defendants, read the cross-examination of the witnesses:

SAMUEL SIDNER, a witness on behalf of plaintiff, being duly sworn, testified as follows:

Examined by Mr. Smith, counsel for plaintiff:

I reside at Southern Ohio—London. I was on this train with Mr. Lockwood. I had cattle on the train—I think five or six car-loads; I would not be positive. I commenced shipping cattle in 1855. I was on
54 the road pretty often with cattle. We left Buffalo then at eleven. We leave at ten. We got to West Albany at eleven. We were on time. We got there on time; but we didn't always get through on time; very often behind. I think we didn't get through on time at that time. I don't think we got to Albany till about one o'clock. We might have got there sooner, but I don't recollect certain about that. I think at that time that we didn't get there till about one o'clock. They make the train up sometimes at Rochester. They start the train out at Buffalo, and when they get to Rochester they change engines and conductors. Sometimes they take double engines, and take 40 or 50 cars out of Rochester, and when they get to Syracuse they change conductors there again, and engines, and then they make up the trains to suit their engines at Syracuse. The train is made up twice; once at Rochester, and the next time at Syracuse. I don't know whether they went out with a double-header from Rochester that might or not. When they have a good deal of stock they send double-headers out of Rochester, and when they get to Syracuse they generally send out a single train. They make up the train to suit the engine. Whatever they think the engine
55 can pull they put on. If the train is too big, they cut off the train and let the next train fetch it. I think we had about 30 cars, as near as I can recollect. When we arrived on the embankment we had about 30 cars; I think 30. I think we got at Canastota Bridge about between twelve and one o'clock in the night. I think it was pretty dark. I think I was asleep at the time they stalled. The first I recollect about Mr. Lockwood was just as he went out of the door, and he was not out very long till some one said there was a man in the pit out there. We then went out, Mr. Redmond and myself, and two or three more. I helped to put Mr. Lockwood on Mr. Redmond's back, and he carried him up to the caboose. We thought he was dead, for he lay there little better than that. It was pretty warm in the caboose, and he vomited almost a quart of water and mud; it looked like some blood, and as quick as we could get him up to Canastola we got him there; but we all thought he was dead or dying. I don't just recollect how bad they did jerk that night. I think I do remember its jerking a little. When they get stalled that way they put the hind brake on the caboose and three or four of the other cars, and they take
56 slack, and have to go with great power. They blow the whistle just as they start, and throw the brakes behind, and they have to go with great power to start the train. Sometimes they jerk a great deal more than other times. I have been jerked so that I fell nearly down, clear nearly over the stove. That is calculated to throw the cattle down. I had my cattle thrown down, but I don't know about this time. I don't just recollect how many were down. I could not tell how many times I had been stalled on this road at this place. I could not tell anything about it. I don't recollect—it was a good while ago, and I don't believe I can recollect. I have been stalled a

great many times on the Central Road, and I don't know whether it was there or at other places. I cannot tell how many times; I know I have been stalled there.

This witness was then cross-examined by counsel for the defendants:

Q. Do you know whether your cattle were down upon this occasion?

A. I don't recollect. I think I had about six car loads, if I recollect right. I had been stalled a good many times on the road, but I could not tell whether it was this place or not. It was not a rainy night; it was a pretty dark night, but not rainy.

57 Q. Do you remember about that?

A. I think it didn't rain; it might have kind of drizzled a little, but I don't think it rained. I think it might have drizzled a little, but that I would not say positively.

Q. At what places, previous to this, had you been stalled on the Central Road?

A. Well, I have been stalled at Lyons. I was in a lot of box cars there once, and they had no cattle cars, and they said I could go in the box cars, and I got stalled there and lay there three or four hours. The cause of our being stalled there was, we had too heavy a load; that is all. We lay there three or four hours. There was a pretty heavy grade there. I think we had 20 or 25 cars upon this occasion at Lyons, when we were stalled. I think about 30 cars we had at Canastota; that I would not be positive about. It might have been over 25; they generally take 25 or 27 cars on the first train. I have been stalled on other roads than the Central—on the Erie Road, though I never was stalled very much on the Erie Road. One night came on snow, but such a night as that most any road would be stalled. I have been over it seven or eight times, but very little on the Erie Road. They

58 pursued the same method on the Erie Road and other roads as they did on this occasion on the Central. Some jerks worse than others. Some engineers, I think, (I don't know, but very likely,) get mad, and they will just pull right out. They will worry till they get out of all patience, and they just will let all the steam on and let her go. I have been jerked clear over the stove, and pretty near fell down.

Q. By Mr. SMITH. Was there any light at this place where Mr. Lockwood fell into?

A. No, sir.

Q. Was there anything there to prevent a man falling in?

A. No, sir. I have looked it all over since that.

Q. By Mr. FAIRCHILD. You have seen this place since then?

A. Yes, sir.

Q. What kind of a place is it?

A. I should think it was a passway for a man to get hay and live stock through—for a farmer to get through. I was along there since that, and I don't know how I came there. I think maybe I got stalled there, got behind time, and got stalled going with cattle; that is, since that, and I got out and examined the place. It was a farm

59 crossing, for teams to go through there. I just heard so much talk about it that I thought I would go right to it, and I went down in it. At Lyons there was a heavy grade, pretty near stalling there, almost every time. They have to go pretty slow, for it *it* a heavy grade there.

VERNON W. MASON, sworn on behalf of plaintiff, was examined by Mr. Smith, counsel for plaintiff, and testified:

I live in Canastota, and my profession is physician and surgeon. I was

called to see Mr. Lockwood on the 6th of June, 1858, about three o'clock in the morning; he was entirely insensible when I first saw him; his respiration was very low, four in a minute; he breathed four times in a minute. The pulse and the action of the heart could not be distinctly felt; occasionally there would be a little pulsation or a little motion of the heart. It seemed to be a shock of the brain and spinal marrow, cerebral spinal shock. I have not any doubt of that; it was very severe. I continued to treat him two or three weeks. I thought the prospect of his living was very slight indeed. I thought he was dead some part of the time; that he would not breathe again. He improved slowly.
60 At the time he left Canastota he complained a great deal of a pain in his head. He had double vision. He was uncertain in his step, and his mind was wrong; his mind was not right. He was moved from there, and I didn't see him again. He went into the charge of Doctor Haight.

Q. State what, in your judgment, is the apparent prospect of his fully recovering?

A. Well, I think the prospect is not good.

ALANSON E. HERRICK, sworn on behalf of plaintiff, was examined by Mr. Smith, counsel for plaintiff, and testified:

I live in Madison Co., town of Lennox. They call it two miles from Canastota. I own the farm which is accom'odated by this first opening through the embankment, I think; this embankment, and bridge over the canal is distinctly in view from my house. From my house the most part of the bridge over the canal, and the embankment is distinctly in view. The barns made hide a small portion of it from my house. The first opening is about 20 feet deep from the bottom of the ditch. There is a ditch running through it that I dug for my own convenience to carry water under, and the bottom of the ditch is about 20 feet from the top of the road; there was not any considerable water run-
61 ning in that ditch. That passage through the embankment was used by me as a cattle way. I never made any great use of that any way. I have drove cattle through, but not very often. The condition of the bottom of that ditch was, there were some stone left there, that I suppose were left from the masonry, when they built it. I cleared out what was in my way when I was digging the ditch. I did not know about that accident, until some time afterwards. I knew nothing about it. I recollect of hearing of the circumstance, but still I could not say what time it was. I didn't pay much attention to it. All I know about it is his falling in, and what I heard here. I presume I heard the thing mentioned at home at that time. That opening through the embankment is about 45 rods from the bridge. I have measured it lately, a little over 45.

Q. What condition was it in?

A Heavy timber was laid across, and the rails were laid on that. The timbers were laid right straight across. There were no ties there. The walls are nearly perpendicular. They slanted back a very little, and then there is a slight projection each side to hold the foot of
62 a brace, that went up into the timbers.

(The counsel for the plaintiff then proposed this question to the witness.)

Q. Tell the court and jury what you know about the stalling on this road before this accident now in question, how often it occurred?

(The question was objected to by the counsel for the defendants as incompetent and im'aterial. The objection was overruled by the court,

and the counsel *and the counsel* for the defendants then and there excepted to the decision.)

A. I have known trains to stall there, as they call it, frequently, before the accident. I have noticed it for the last 20 years. Freight trains, all kinds of freight trains, I should think, I have seen stalled there. I have seen them stalled there in the evening, and in the day-time. I have seen them mostly in the day-time. I don't sit up at night to watch them. When I don't sit up at night and there is stalling, I know that stalling is going on. I judge so from the noise they make, backing up and climbing around; you can tell pretty near what they are at. I think there is not any kind of difficulty in knowing
63 what they are at. I had, before Mr. Lockwood was injured there in 1858, been out on to that embankment when they were there at night, but I could not state any particular time; how many times I could not say. I have been out there when there have been one or more trains stalled there, and I used to see what they were doing, and what fuss there was. I have crossed this opening in the night-time. As a general thing I would straddle the iron, and feel my way across the track. Whether a man could walk across it in the night-time with any safety would depend on how dark it was. I have been across there on my hands and knees when it was very dark; I would not trust myself to walk.

This witness was then cross-examined by Mr. Fairchild, counsel for defendants:

The land, in the neighborhood of where this embankment was made, is lower than the canal banks. The object of this embankment that has been spoken of, through which these openings are cut, I suppose, was to get over the canal by the railroad—that it was made for the purpose of carrying the railroad over the canal. It is made properly
64 for that purpose. There is no other way they could get over the canal, I think—not at that place.

Q. You have testified that the embankment is properly constructed for the purpose of carrying the railroad over the canal. The question now is in regard to the construction of the farm crossing. Is this opening the proper way of making a farm crossing?

A. I should think it was at that place; so far as the farm is concerned, I mean.

WILLIAM S. MINOR, sworn on behalf of pl'ff, was examined by Mr. Smith, counsel for plaintiff, and testified:

I have known Mr. Lockwood for over 30 years. I live in Stamford, Connecticut. Before this occurrence he was physically a remarkably strong man, mentally active, and energetic, and a good business man. I saw him probably within six months after the injury. His mind appeared then to be inactive, sluggish. His memory appeared to be impaired. Physically, his condition appeared to be injured; his nervous temperament broken up. His walk was uncertain. His vision
65 appeared to be double. He walked very much as I have seen persons intoxicated walk. He would fix his eye upon an object ahead, and move towards it with a degree of uncertainty, as if he failed to see where he was stepping. He would fail to recognize myself, with whom he was very well acquainted, until I had spoken to him, recognizing by the voice rather than by the vision. His uncertain step and his failure to recognize have continued almost down to the present time. His failure of memory continued to a very great extent; I should

for 4 or 5 years. That appears to have been regained almost now, but his physical constitution, from what I have seen of him and knew of him since, and what I knew of him before, appears yet to be shattered and broken. Before this injury he was engaged as a cattle drover. I only know how actively he was engaged in it from the time I was a director in our bank. He was an active, energetic man, engaged in the business of cattle driving; engaged substantially all the time in that business.

Cross-examined by Mr. Fairchild, counsel for defendants:

I am now a judge of the superior court of Connecticut; pre-
66 vious to my appointment I was for 25 years an attorney at law; I was originally consulted by Mr. Lockwood; as the case was to be brought in New York State, I turned him over as a client to Mr. Smith, and I have not had charge of the case as counsellor or attorney, since 1860. Mr. Smith has brought the case and attended to it as counsellor, since. I consulted with Mr. Smith about the case at that time, and I was a witness in the case that was tried before Judge Mason, I think, in the State court in New York, in 1862, and I don't recollect that I have consulted with Mr. Smith about the case since that time; I don't think I have; I am very certain that I have not; I think the plaintiff is improving in his physical condition slightly; but those two peculiarities of which I spoke, his double vision and the difficulty in walking, I think they still continue perhaps to as great an extent as they existed within three years after the accident; I should think I have seen him as often as once a month about the village; I cannot tell whether he is in the village oftener than that. He lives upon a farm some 3 or 4 miles north of the village; I am not able to say whether he

does or not manage the farm himself; I do not know whether
67 he has purchased cattle since this accident; I have talked with him upon various matters, and his mind still wanders. There is a difficulty, on his part, of fixing his mind attentively on any kind of business, and that continues up to the present time His memory appears to be slightly defective; yet, I should think, his capacity for judging of the value of property was better now than it would be 5 or 6 ago, generally.

JOHN REDMAN was sworn on behalf of plaintiff, and examined by Mr. Smith, counsel for plaintiff:

I live now in Christian Co., Illinois; I was on this train when Mr. Lockwood was injured; about 12 o'clock in the day we left Buffalo; I went to Rochester and had supper there. They changed engines there, and made up the train, and put more stock on to ours, and then we ran from there to Albany. It was after twelve o'clock when we got to this embankment; between 12 and 1 o'clock we generally get there. It was in the night. We started from Buffalo on the 5th of June, 1858, and this was in the night—on the night of the 5th and 6th of June, when

we got on to that embankment; we were stalled there, the train
68 stuck; we were stalled and they tried to get up; they put the brake on the caboose, the hind car, and they could not get up, and they put a block of wood under the wheels of the caboose and backed up, and pulled forward to get up, and they did'nt do that, and finally the train came behind us and pushed us up. The next train pulled us up and pushed us up together; after they had put on the brake to the caboose, and had blocked it up, they jerked several times. I guess we were there about half an hour. They jerked pretty strongly.

You know how an engine jumps forward in pulling—the effect on the cars; it jerks the cars sometimes. The floors, where the cattle stand, get slippery going that distance, and they jerk them down. It is very liable to jerk them down. A man came into the caboose, and said the cattle were down, and Mr. Lockwood asked him, whereabouts; and he said about the centre of the train; and Mr. Lockwood said, "Kelsey, that is about where our cattle are," and started to go out. I had an old light there—I never do carry a lamp, but I had a horse stalled there with the cattle, and I borrowed a lamp of another man at Colum-
69 bus—and he went to pick up that, and I told him there was no oil in it, and he stooped down to pick up a lamp in the centre of the car, and he caught him by the arm and told him not to take that, so he went out. The brakeman went out at the east end of the caboose, and I don't know whether he walked on the ground or on top of the cars; I suppose he walked on the tops of the cars; I don't know, but he went out at the east end of the caboose. Then, I think, Mr. Dunbar came to me and told me there was a man hurt, and I went out and found Mr. Lockwood in this ditch where he fell; I carried him up; I walked down there. It was made in the shape of a scoop shovel. The bank slants, and I went round the culvert where he was; I went down the railroad bank. The bank is pretty steep there. I went down the railroad bank and around. It is a kind of slanting. I went down the railroad bank—down the side of the bank, and around to the opening.

Q. In what condition did you find Mr. Lockwood when you got down?

A. I thought he was—I didn't know, but from the position he
70 was in, I thought he was dead, and Mr. Kelsey had pulled his head a little out of the water, and his nose was in the water; pulled it up so that he would not strangle, and I carried him up; I carried him up on my shoulders, and laid him in the caboose; I had no difficulty in getting up with him; I put him in the caboose. He was in a very bad condition; he vomited. I went on then out of the caboose; I went over to look at my cattle and his too; I went over the cars until I came to my cattle; I could tell by climbing down between my cars; I shipped so many cattle I knew my cars without taking the numbers.

Q. State to the court and jury whether anybody informed you it was not safe to go out on the road after you brought Mr. Lockwood up?

A. Yes, sir; I think Mr. Dunbar told me not to go out there, that it was a bad place; but I did go out and walked over the cars; walked over the place where he fell in.

Q. Where did you remain until you got down to Canastota?

A. I stopped on top of the cattle cars, where the cattle were.

Q. Did you see anything of Mr. Lockwood down at Canastota?

71 A. I won't say whether I did or no. I didn't charge my mind, and I don't recollect whether I helped to carry him or no. I first came across Mr. Lockwood in Buffalo. I did not go up with him to the office of the company to get any pass. Their practice is to load the cattle into a train, and then to stand them on the side track, say a train of 20 or thirty cars, and then they give to us the numbers of our cars to go to the office for our passes. Then they make up another train. One train starts at about 12 o'clock, and another at one o'clock, and another at 2 o'clock. We started on the 12 o'clock train. There are generally three trains. The roadmaster, who, I think, was Mr. Barr, would, on the completion of a train, set down the numbers of the cars of each drover, and give it to him to go down to the office, about 400 or five hundred yards off, to get his pass to go with the cattle.

They do not give any drover any memorandum of the numbers of his cars until the full train is loaded.

The witness was then cross-examined by Mr. Fairchild, counsel for defendants:

You can tell when you get to the end of a car easy enough the darkest kind of a night. There is a vacant place between the cars that looks black. The cars are generally made out of pine wood—
72 light wood—and I could tell the difference, and I could feel, for that matter. I always carry a pole, and I could feel; and when I got to my cars I got between and struck a match, and I knew the numbers. I struck a match between the cars, and I could see the numbers. I didn't strike a match at the time I came to the end of every car, because I knew my business, and I knew where my cars stood, and I knew how many were between the caboose and my cattle. I had four cars. There were eight cars between mine and the caboose. I passed over eight cars, and I knew there were eight cars between mine and the caboose. Mine was the 9th car, and I had four cars, and that made twelve. I counted the cars as I went over them. The night cannot be so dark but what you can see the seperation between one car & another. I did not go out of the car as soon as I heard it announced that the cattle were down, because I always looked at them up to Syracuse, and there is none below, and I always go out there to look at them. I did not go out to look at them at that place. I did not care about going out when they were moveing backwards and forwards. Sometimes they cut the train there, and pull up and come after
73 the balance. I did not care about going out then. I had been on the road a good deal, and knew about this stalling place; but I did not know anything about this trap, this other place where he fell, and I did not go out, but I go' out at the next stopping place. This is not a regular stopping place, where they stalled. I never knew them to stop there without they are stalled. There is no station there. It is no place for wood or water; not that I know of. I have been driving cattle ever since I was 14 years old. I drove to Hancock, and used to car a good deal in 1844. I have driven through by land to this city from Ohio, and walked back many a time. I have been carrying cattle ever since I carried from Ohio. I have been engaged in carrying cattle upon the railroad from the West since 1851; but I have driven cattle to Cumberland, Maryland, and carred them down from there to Baltimore on the Baltimore and Ohio Railway, and I did that in 1843, and I did it when they never stalled cars there; but I put mine in a car. Ever since 1843 I have been engaged in carrying cattle on the railroad—that road; but the first I shipped over the old road was in 1844. Since that time I have been engaged in carrying cattle
74 over this line of road. I have shipped them over all roads nearly. I shipped pretty nearly until 1861 from 1854. I have shipped over the Erie Road and the Amboy Road to Philadelphia. I read well enough to be able to read the numbers of the cars—I cannot read writing—and I think that is very good for a Virginian. I don't write myself; no, sir. I cannot read print. I can read wherever there is a dining-saloon better than any other place. I can read print, but I cannot read writing. Sometimes I get the number set down for me; but I have shipped so much, that I can tell the number of all my cars. I have shipped sometimes as many as 30 cars down here from Alexandria, Illinois. I can tell all my cars. I can tell them without reading the numbers. I can't tell by looking at the numbers. I know the

numbers; but there is always something about it—a little flag or a chip—by which I can tell. I went out of the east end of the caboose that night. I think Mr. Lockwood went out of the east end, next the cattle. He went out before I did. I never went out until after he got hurt, and fetched him up. I did not notice but one man go out with him; that was Kelsey. There were not very many drovers in the caboose that night. I don't think there were more than 4 or 5.

75 I noticed no one go out except Lockwood and Kelsey. I did not notice the other men. I don't think there were very many cattle in that train. They were most hogs and sheep, and they don't need as much attention as cattle do. This was one entire train; I think they said there were about 34 cars. There were 34 cars in this train. There was another train following it. I don't know how many trains were following us. I could see the head light of one train following us. There are generally two or three trains following one another. I don't know whether there were more than two that night; I did not go back to look.

Q. By Mr. SMITH. This was the first train, was it not?

A. I won't be certain of that. There are so many trains ahead running along that road that I cannot tell.

Q. By Mr. FAIRCHILD. You don't know whether this was the leading train or not at night out of Syracuse?

A. No; I don't know. It might have been. I don't know whether there was a train ahead of us or not. We were detained there that night about half an hour. I thought it was half an hour then. I think it was about half an hour from the time we were stalled until we left him at Canastota.

76 Redirect examination:

Q. By a JUROR. I understood you to say that when you went to go out of the train the man said to you, you had better not go out, because it is dangerous, and when Mr. Lockwood went to go out, did the same man tell you his cattle were down?

A. No, sir.

Q. By Mr. FAIRCHILD. Was the same man there at the time Mr. Lockwood went out?

A. I don't know whether he was or not. Mr. Dunbar was our conductor, and he was the man that told us it was dangerous afterwards.

By Mr. SMITH. It was the conductor told us it was dangerous. I don't know the man who came in and told us Lockwood's cattle were down. I never seen him since. It was not the conductor; it was the brakeman. I have never seen him since.

CHARLES C. LOCKWOOD recalled and examined by Mr. Smith, counsel for the plaintiff:

I was present when my cattle were loaded. When I started to go up to the office for my pass the cattle were loaded on the train, and it stood on the switch. I think the engine, to the best of my recol-

77 lection, was attached, because Kelsey said, "We shall have to hurry." We did hurry. We went down there about as quick as we could. I think the distance was about a quarter of a mile. I know it was a considerable distance. We ran a part of the way, and walked smart. When we got up to the freight-house we presented a paper there given us by the shipping-master, having on it the numbers of our cars. We wanted our tickets, so they filled out a printed form, and shoved it out to us on a table or desk, and told us to sign it. They gave me the

pass first, then they filled out this release, as they term it, and told me to sign it. I did sign it. They shoved it to me, and asked me to sign it, and I hurried back as fast as I could go. I did not take it up and deliver it to them. I had no opportunity to read it.

Cross-examined by Mr. Fairchild, counsel for defendants:

I told the man who had charge of loading the cars which were my cattle. I did not help load them, but saw them loaded. I went along for the purpose of taking care of my cattle. It was Kelsey that I talked with when I went for the pass. We assisted each other
78 down from Chicago. I do not know who filled out the pass—it was the clerk—it was in the office. We stopped in the office but a moment, just as soon as we could get through with our business we were off. There is a great object in having the cattle up when the train starts—to have them *them* all what we call "on their legs." After the train was loaded my whole time was occupied in going to the office and getting my pass. I believe the engine was on when we started for the office. I know it was when we got back. I spoke to the clerk in the office and told him I wanted a pass, and gave him the numbers of my cars. I had two and got only one pass. I did not ask him for anything else than the pass. At the time he handed me the pass he filled out a blank and shoved it to me on the desk, and told me to sign that. He did not hand both papers to me together—he did not hand them at all. I guess he threw the pass to me. It was all done in a very short time. When I signed that paper I did not ask what it was, the man who filled it out did not say anything to me. I signed it because I supposed I had to. I thought that was their way of doing business, and that there was nothing irregular about it. All I heard about the
79 release, was to release the company from liability for the stock. I heard nothing about personal injury at all. I was told on the train, coming down with the drovers from Chicago, that I would have to sign a release from liability for injury to the stock. The man who pushed the release out to me did not tell me any such thing, nor any one else connected with the New York Central R. R. As soon as Kelsey and myself got our passes we started back as fast as we could. We were in a hurry, and wanted to get back in order to have our cattle up when the train started.

Reëxamined by Mr. Smith, counsel for the plaintiff:

I was told on the road from Chicago, that I would be required, on getting my pass at Buffalo, to sign some release, that it would be a release of the company from liability for injury to the stock. There was nothing said about my taking the responsibility of the sufficiency of the cars. I got back to the train soon enough to ascertain whether my cattle were up or not.

Mr. Smith, the counsel for plaintiff, then proposed to read from a report made by the defendants to the State engineer of the number of accidents which happened on the New York Central R. R. during
80 the year 1858. It is conceded by defendants' counsel that the book produced may be deemed sufficiently authenticated, and be treated for the purpose of this trial as the original report of the def't's to the State engineer.

(The counsel for the defendants objected to the same as incompetent and immaterial, and that statements therein contained of defendants' officers, subsequent to the transactions in question, are not evidence against the defendants.

The court overruled the objection, and defendants' counsel then and there excepted to the decision.

The plaintiff's counsel then read from said report the following paragraph:

"JUNE 6. Charles Lockwood, while walking on the track at Canastota, at night, fell through an open culvert, sustaining some bruises by the fall."

JOHN REDMAN, recalled as a witness to the plaintiff, was examined by Mr. Smith, counsel for pl'ff:

Q. Were you ever stalled on that embankment before this occasion on which Mr. Lockwood was injured?

(The counsel for the def'ts objected to the question as incompetent and immaterial. The objection was overruled by the court. Defendants' counsel excepted to the decision.)

81 A. I would not say how many times, but I have been stalled as much as ten times that I know of. I have been stalled there since. I cannot tell how many years that had been going on, or within what time or about what time. I can tell ever since I have been shipping on the road; since 1854 I have been stalled there several times.

This witness was then cross-examined by Mr. Fairchild, counsel for def'ts:

I have been over the road with cattle a good many times. I did business over the road from 1854 to 1861. I went over about every two weeks in 1858 and 1859; and when I commenced in 1854, I did'nt go more than 5 or 6 times; in 1855, about 5 or 6 times; in 1856 I went over it may be 15 times, and in 1857; I went over every two weeks, in 1858 and 1859, and I kind of slacked up during the war, and went South with cattle. I shipped a lot of cattle from Columbus every two weeks in the summer, and in the winter I would buy cattle to take away in the spring. During that time I have been stalled on this embankment ten times that I know of. The first time that I am certain of, I had a big load of

82 cattle—in March, 1855—the spring of 1855. I had only four car loads of big cattle. I don't recollect how many cars there were in the train at that time. There was a big heavy lot of premium cattle I had that were shown around at fairs. There was no snow on the ground. It did'nt rain. The spring of 1855 was the first time I ever was stalled there. I might be stalled at night and pay no attention to it. It happened to be day-time we came there that time. I don't know whether the reason of being stalled was the grade. I cannot tell without there was too much load. There was a car broken down about Batavia, and it was in the day-time when we came along past this place in 1855. We came along in the day-time, and we had a car that broke down, and they reshipped them, and we came along there in the day-time. We always left Syracuse at twelve o'clock at night, but this was in the day-time, and I had a big load of cattle. I don't know how many cars there were in the train. I don't know how many trains were in our company at that time. I was stalled there afterwards; the second time was in summer, in 1855, several times, as much as 10 times for certain. I did'nt take notice of the second time. I was stalled

83 there in the night. I was stalled there several times.

Mr. FAIRCHILD. I am trying to find out about the second time you were stalled there.

A. I don't know about the second time. I was stalled the first time at canal grade, but I don't know the second time I was stalled there; I was

stalled there as many as 10 times during the time I went over the road and I have been stalled there since.

Q. Have you ever been stalled there in the winter time?

A. No, sir; it was in March I was stalled there.

Q. Always in March?

A. No, sir, the first time, but I have been stalled there in June, July, & August; I was stalled there with Mc Coy's cattle in 1857, with a lot of cattle.

Q. Do you mean to swear you have been stalled there during the whole time you have been doing business on the railroad every time?

A. Not every time, I went over the road more than ten times.

Q. During which period?

A. From 1854 to 1861.

Q. How many of those 10 times were you stalled there in 1861?

84 A. I could not tell how many times I have been stalled there in a year, but I have been stalled there as many as 10 times when I have been coming over the road from 1854 to 1861.

Q. How many times were you stalled there before 1868?

A. I cannot tell you, I never kept an account of it, I didn't put my mind on it, and never thought anything about it until after this man was hurt.

Q. Will you swear that, previous to 1858, you were stalled there five times?

A. Yes, sir, I will.

Q. How many times?

A. I will swear to five times on a guess.

Q. Will you swear to any more times?

A. No, I won't; I will swear to five times; I know I have been stalled there a great many times.

Q. How long were you stopped there this first time?

A. Oh, well, I can't tell; sometimes they would not stop there as long as other times—10 or 15 minutes, sometimes 20 minutes, and sometimes not as much; sometimes they would cut the train in two and go up on the switch and come back for the cattle; I cannot tell how long we were there.

Q. How long were you detained there at each of these five times that you were stalled there previous to 1858?

85 A. I could not tell, it has been a good many years ago since 1854; I could not tell how long I was there; whenever we were stalled we would always run out to get a drink or something to eat, and we never paid attention to how long we stopped there, so that we caught the train, that is all we cared about; I cannot tell how many minutes I was there.

Q. Do you mean to swear that when you stopped there you went out to get a drink?

A. No; I don't mean to swear at that place.

Q. Why do you say so?

A. I said when I was stalled along the road; I didn't say that place particularly, we wanted to get something to eat.

Q. There is no grocery there where you can get anything to eat?

A. No; but there are farm-houses there where we can get something to eat.

Q. You don't get anything to drink at any of the houses there?

A. No, sir; we get something to eat, and get milk to drink, a good many of these shanties along the road have cows.

Q. Is there a shanty on this embankment?

A. Not that I know of, there is not.

Q. If there is no shanty, you cannot get milk even to drink there, can you?

A. No, but you don't know how far we could run while we were
86 stalled there; I cannot tell you how many minutes I was there, but I was there sometimes 5, 10, 15, 20, and thirty minutes.

Q. I want to know whether 30 minutes is the extent of the time you were detained there?

A. I don't think I was ever detained much over half an hour; I think the time when Lockwood was hurt when we got up to that station it was about an hour.

Q. From the time you first stopped until you got to Canastota?

A. Yes, sir.

Q. And previous to these five times when you were stalled there before, you were detained from about 10 to 30 minutes?

A. Yes, sir; I could not tell to a minute, it has been so long.

Q. You don't know on any of these five occasions how many cars were on the train?

A. No, sir, I don't; I always get my cattle down to the pens as soon as I could; I got them on the first train and they were always close to the caboose, and I never ran ahead to see how many trains there were; I never was more than 10 or 12 cars forward of the caboose, and the first load is the next to the caboose.

Q. Can you tell on any of these five occasions what was the reason of the train stopping there?

87 A. They had not power to pull up the grade; sometimes they would use green wood and would not get it up; your men call seasoned wood hard wood, and green wood soft wood, but sometimes they would use green wood and could not get up, and they would neglect the steam and didn't get up, some engines will go over some grade and won't stall, and the next time they will stall.

Q. Have you ever been stalled at any other place?

A. I have not on that road.

Q. Never at any other place?

A. No, sir; not along that road.

Q. Never in a passenger train?

A. No, sir; I never was stalled in a passenger train; we laid by at Syracuse once to hear a speech.

The plaintiff here rested the case.

Defendant's counsel then requested the court to instruct the jury hereupon as follows:

1. The contract evidenced by the pass and the cattle release is a defence and precludes a recovery in this action, and the jury should render their verdict for the defendants.

2. That there is no evidence sufficient to justify submitting the question to the jury of any negligence on the part of the defendant
88 which in any degree contributed to plaintiff's injury, and the verdict should therefore be for the defendant.

3. That the plaintiff was guilty of great negligence which contributed to his injury, and the verdict should therefore be for the defendant.

The court refused to give either of the instructions prayed for in this stage of the trial, and the defendants' counsel separately excepted to the refusal as to each request, and requested that his exception as to each request, and refusal be noted, which was done.

SOLOMON DRULLARD, was then sworn on behalf of defendants and examined by Mr. Fairchild, deft's counsel:

I am the general freight agent of the defendants. Have been engaged in that capacity since 1853, about 16 years; previous to that time I was engaged on the Buffalo and New York City Road; it is a portion now of the Erie Road; in the same capacity for 3 years; in June 1858, there was a tariff in force on the New York Central Railroad in regard to fixing the price of carrying cattle. That tariff was posted up in the freight houses along the line of the road; the copy of tariff now handed
89 me is the tariff, a corrected tariff, October 11th, 1858; the price for carrying cattle by that tariff is as corrected there, as it was in June, 1858. Those are the rates that were in operation at that time; those were the established rates in force on the 5th of June, 1858, and those were the conditions upon which we carried single cattle or less than car loads.

Mr. FAIRCHILD. I will read that portion of it which I desire to put in evidence.

"Live stock in quantities less than a car load will be taken at the following estimated weights at first-class rates: One horse, mule, or horned animal will be rated at 2,000 lbs. Two horses or horned cattle, at 3,500 lbs. Three horses or horned cattle, at 5,000 lbs.; any excess over 5,000 lbs. and less than a car load, at actual weight."

Mr. Fairchild reads further:

"Reduced rates on horses, mules, cattle, sheep, hogs, and other live stock, per car load, from the stations named below to Albany, Troy, Schenectady, and from Albany, Troy, and Schenectady to said stations, when taken entirely at the risk of the owners from Lewiston, Buffalo, Blackrock," naming all the stations on the road "to Albany, Troy, & Schenectady, cattle by the car, $70 a car load."

This was in force in June, 1858; I propose to put the whole of that table in evidence, although it is not necessary to read it all.
90 This first table speaks of carrying live stock in less quantities than a car load, at the following estimated weights at first class rates: 70 cents a hundred pounds from Buffalo to Albany. This tariff was posted in the freight house at Buffalo, and in all the freight offices; it was posted on the entire line of the road. This tariff was in February, 1855. It had been posted from that time up to the time this accident happened, and is still posted, with the alterations. (The witness looks at the cattle release in evidence, and says it is the general custom of drovers to sign such a cattle release as that, and has been since 1854 with the Central Railroad.) It is customary to give such a pass as that in evidence, to drovers in charge of stock down. That custom has prevailed, I know, since 1853. All drovers sign such a contract as that on applying for a pass, and take such a pass. That was so on the 5th of June, 1858. That is the general order of the road, and the agents are not allowed to violate it, and they don't violate it; unless drovers sign such a contract, the agents are not allowed to take cattle at that reduced rate. This reduced rate is less than the tariff rates. The difference between the price when the drover goes along and takes care of his cattle and takes the risk, was 50 per cent. at that time.

91 Q. How many of these releases are executed in the course of a year, on the New York Central Railroad, or were at that time in June, 1858. I want to get at the general custom; and how many cattle were carried over the road?

A. I cannot state with any positiveness in regard to it, but I should judge perhaps 50 contracts a week, in 1858. That has prevailed since

1854. There was used on the average during that period, about 50 a week. I think there are more now, but at that time, June, 1858, I think there were about that number. The average for the whole period during which they had been in the habit of taking these releases a week, prior to that time, from 1854 up to 1858, I should judge was from 30 to 40 a week, on the average. These contracts are in use on all other roads, so far as I know, On the Erie Road, Pennsylvania Central, New England roads. It is used on the Boston and Albany Road, and on the line from Troy to Rutland, and through Rutland to Boston. This same contract is used on the Lake Shore Road, or a similar contract, by which the drovers assume the risk of their stock and of personal injury. All of them have got "personal injury" in it—I think all
92 of them—all I have seen. My business has been to negotiate terms and conditions with those roads in the transportation of property. I have travelled over pretty much all of them, and have met in meetings and conversations with those railroad parties in arranging the business of the line frequently every year—a dozen times in a year. It is customary and is the custom universal upon all the roads, and with all transportation lines, so far as I know, to charge different prices for carrying different kinds of property. My business before I went into the employment of a railroad company was the transportation business between New York and Chicago by water, all my lifetime; I never did anything else but transportation; I commenced when I was about 18 or 20 years old, and continued it since. It is not customary to carry valuable animals at the same price you carry animals of ordinary value. The practice is, if a man has a valuable horse, to carry that horse at the ordinary price, fixing a value of from $150 to $200, and enter into a written contract, he assuming the liability or loss, whatever it may be, over and above that amount. We don't carry race-horses valued at $20,000 at the same price we carry a hundred-dollar horse. It is
93 customary to refuse to carry these very valuable animals unles' that party agrees to take the risk. We refuse to take them altogether unless they assume the risk of the animal. That is the custom of all transportation lines, so far as I know. It is the universal custom to carry property at a less price when the owner goes along and takes care of it and assumes the risk, than where the person carrying the property assumes the risk. I think that is the universal practice in all roads. It is on steamboats—with carriers by water as well as by railroads. That has always been the custom ever since I have known anything of the business, by water as well as by railroad. The custom of making this discrimination is not a new one with railroad companies. There are other kinds of property that are carried at estimated weights, estimated at a good deal above the actual weight. Furniture is estimated over and above its estimated weights; wagons, carriages, and there are quite a number of other articles—willow-ware and chairs of every description. A difference is made between property perishable and that which is not perishable; we charge a greater price, as a general thing, for perishable property. We make another distinction on extreme perishable property. For instance, if we ship potatoes
94 in frosty times, or apples, we claim they should pay the frieght in advance, and take the risk of frost, for fear that when they get to their destination they would not be worth the freight. In regard to property that is peculiarly liable to take fire, such as cotton, hay, and hemp, we take it at the risk of fire; we enter into a contract with the parties that they shall assume the risk of the fire; the owner of the property takes that risk. That custom on cotton extended from the

Mississippi River to the Atlantic. This business of carrying cattle by railroad is of comparatively recent origen. I think about 1845 or 1847 commenced carrying cattle. I think the commencement of carrying live stock by railroad was in 1845 or 1847, through this State. It was driven previous to that, and previous to that the railroad companies had no means of carrying live stock. I have carried cotton ever since I have been on the railroad; for the last 16 or 17 years cotton has been carried, but not in so great quantities as it is now carried, owing to the
erence in prices, I suppose.

This witness was then cross-examined by Mr. Smith, counsel for plaintiff.

I live in Buffalo, and did in June, 1858. Bills as to the rate at
95 which our road carry stock from Buffalo to West Albany are sent from my office. I live in Buffalo, but my office is in Albany. They are sent from my office to all the stations on the line of the railroad by circular, and into Ohio, Illinois, and Indiana, specifying the rates in that paper; on these bills that were posted up in May and June, 1858, it was stated we would carry stock forward from Buffalo to West Albany at $70 a car load.

Q. Was anything said about any higher rate on these bills?

A. Yes, sir; that less than car loads we would charge 70 cts. per 100 lbs.

Q. I am inquiring about full car loads.

A. That was the price—$70 a car load. When we spoke of carrying full car loads we said nothing about any higher rate than $70 per car load. That was the usual rate. We were competing with the Erie Road, and always have been in competition with it. When they put down, we put down. They varied every two or three years before 1858. It has been higher and lower, but I cannot confine myself to any particular date.

CHARLES HILTON was then sworn on behalf of def'ts, and examined by Mr. Fairchild, counsel for defendants:

I reside at Albany. My occupation is civil engineer. I have
96 been in that business something over 20 years on railroads; first, upon the Boston, Concord, & Montreal Road, in New Hampshire; then upon the Utica & Alleghaney R. R. in this State, which was never opened; and since 1854, upon the New York Central Railroad most of the time. I am acquainted with the road at the point where this embankment is that has been spoken of. That embankment and the openings through it are very properly constructed. The embankment is a good one, of sufficient width, and the masonry, although not of the very first class, is very good, substantial masonry, and shows no signs of weakness or delapidation. For the purpose for which it was constructed it is constructed, as I consider, in a proper way, and it is in the usual way. It is constructed in the way in which such works are generally constructed upon all railroads, as far as I know. It is necessary to have an embankment there in order to get over the canal. The general level of the country in that vicinity is about the same as the water in the canal, that is, west of the canal crossing. It is necessary that the bridge should cross the canal at an elevation of about 13 feet in clear, above the water, and in order to cross the canal it is necessary for the
railroad track to raise gradually from the west until they reach
97 the canal, so that when they reach the canal they will be at this required height in addition to the thickness of the floor of the

bridge, which will make the height about 17 feet. When I said that the general level of the country west of the canal is about the same as the water in the canal, I was not strictly correct. The land is lower. The water in the canal is higher than the canal west, so that the embankment when it reaches the canal is about 23 feet high above the level of the land. At the first farm crossing west of the canal bridge the grade is not strictly uniform. From the farm crossing west it is a reasonable grade. There are heavier grades on the road. It is no steeper than I should make the grade if I was building the road. In regard to covering these farm crossings, it is proper to leave them open. It is usually done so. It is usual upon all roads that I know anything about the custom of in regard to that. West of this opening that has been spoken of there is a highway crossing. I am unable to state the distance. It is on the same grade. I think it is about at the foot of this grade, and not far from 3-quarters of a mile west of the bridge, perhaps a mile. The purpose of this opening, I suppose, is for a farm
98 crossing. East of this opening, 750 feet, is the canal bridge. There is no floor across that; that is, if you mean by "a floor" a plank, a close floor, I say there was none. There is a highway crossing under the same bridge that crosses the canal.

This witness was then cross-examined by Mr. Smith, counsel for plaintiff:

It is proper to leave these cattle openings uncovered, because it is not necessary for the purpose of conveying the trains to have it covered.

Q. Suppose they are in the habit of stalling cattle trains right over that in the night time there, would it not be of some use to have it covered, or do you mean to have the jury understand you think it best to have a man-trap there?

A. I mean to have the jury understand precisely what I say, that it is not necessary to have them covered, and it is perfectly proper to have them uncovered.

Q. Although trains are stalled over there in the night time, do you mean to tell them that it is proper?

I mean to tell them precisely as I have told them.

FRANCIS A. UTTER was next sworn on behalf of def'ts, and examined by Mr. Fairchild, counsel for defendants:

99 My business is civil engineer. I have been in that business 25 years on the State canals and the Hudson River R. R. I was engaged upon the New York State canals some 4 years; upon the Hudson River Road something over 15 years. I am somewhat acquainted with this locality that has been spoken of. I passed over there frequently. I think that work is constructed in the way in which such works are usually constructed on railroads. It is customary to cover such farm openings on the Hudson R. R., and, so far as I have observed, on other roads it is not customary. I am somewhat familiar with the New York Central in the vicinity of Utica, and with the road leading north from Albany to Cohoes, and somewhat with the Troy end of the Boston Road, a short distance, and somewhat with the Albany & Boston Road in the vicinity of Greenbush. Such openings are usually left uncovered upon those roads. There are several reasons for it. In the first place they are usually kept open on account of their lasting longer, the timbers not so much exposed to the weather, consequently it will last longer. Another reason is they served as cattle guards, and they also prevent the track becoming a thoroughfare for people walking along the

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99 My business is civil engineer. I have been in that business 25 years on the State canals and the Hudson River R. R. I was engaged upon the New York State canals some 4 years; upon the Hudson River Road something over 15 years. I am somewhat acquainted with this locality that has been spoken of. I passed over there frequently. I think that work is constructed in the way in which such works are usually constructed on railroads. It is customary to cover such farm openings on the Hudson R. R., and, so far as I have observed, on other roads it is not customary. I am somewhat familiar with the New York Central in the vicinity of Utica, and with the road leading north from Albany to Cohoes, and somewhat with the Troy end of the Boston Road, a short distance, and somewhat with the Albany & Boston Road in the vicinity of Greenbush. Such openings are usually left uncovered upon those roads. There are several reasons for it. In the first place they are usually kept open on account of their lasting longer, the timbers not so much exposed to the weather, consequently it will last longer. Another reason is they served as cattle guards, and they also prevent the track becoming a thoroughfare for people walking along the

Mississippi River to the Atlantic. This business of carrying cattle by railroad is of comparatively recent origen. I think about 1845 or 1847 commenced carrying cattle. I think the commencement of carrying live stock by railroad was in 1845 or 1847, through this State. It was driven previous to that, and previous to that the railroad companies had no means of carrying live stock. I have carried cotton ever since I have been on the railroad; for the last 16 or 17 years cotton has been carried, but not in so great quantities as it is now carried, owing to the
erence in prices, I suppose.

This witness was then cross-examined by Mr. Smith, counsel for plaintiff.

I live in Buffalo, and did in June, 1858. Bills as to the rate at
95 which our road carry stock from Buffalo to West Albany are sent from my office. I live in Buffalo, but my office is in Albany. They are sent from my office to all the stations on the line of the railroad by circular, and into Ohio, Illinois, and Indiana, specifying the rates in that paper; on these bills that were posted up in May and June, 1858, it was stated we would carry stock forward from Buffalo to West Albany at $70 a car load.

Q. Was anything said about any higher rate on these bills?

A. Yes, sir; that less than car loads we would charge 70 cts. per 100 lbs.

Q. I am inquiring about full car loads.

A. That was the price—$70 a car load. When we spoke of carrying full car loads we said nothing about any higher rate than $70 per car load. That was the usual rate. We were competing with the Erie Road, and always have been in competition with it. When they put down, we put down. They varied every two or three years before 1858. It has been higher and lower, but I cannot confine myself to any particular date.

CHARLES HILTON was then sworn on behalf of def'ts, and examined by Mr. Fairchild, counsel for defendants:

I reside at Albany. My occupation is civil engineer. I have
96 been in that business something over 20 years on railroads; first, upon the Boston, Concord, & Montreal Road, in New Hampshire; then upon the Utica & Alleghaney R. R. in this State, which was never opened; and since 1854, upon the New York Central Railroad most of the time. I am acquainted with the road at the point where this embankment is that has been spoken of. That embankment and the openings through it are very properly constructed. The embankment is a good one, of sufficient width, and the masonry, although not of the very first class, is very good, substantial masonry, and shows no signs of weakness or delapidation. For the purpose for which it was constructed it is constructed, as I consider, in a proper way, and it is in the usual way. It is constructed in the way in which such works are generally constructed upon all railroads, as far as I know. It is necessary to have an embankment there in order to get over the canal. The general level of the country in that vicinity is about the same as the water in the canal, that is, west of the canal crossing. It is necessary that the bridge should cross the canal at an elevation of about 13 feet in clear, above the water, and in order to cross the canal it is necessary for the railroad track to raise gradually from the west until they reach
97 the canal, so that when they reach the canal they will be at this required height in addition to the thickness of the floor of the

bridge, which will make the height about 17 feet. When I said that the general level of the country west of the canal is about the same as the water in the canal, I was not strictly correct. The land is lower. The water in the canal is higher than the canal west, so that the embankment when it reaches the canal is about 23 feet high above the level of the land. At the first farm crossing west of the canal bridge the grade is not strictly uniform. From the farm crossing west it is a reasonable grade. There are heavier grades on the road. It is no steeper than I should make the grade if I was building the road. In regard to covering these farm crossings, it is proper to leave them open. It is usually done so. It is usual upon all roads that I know anything about the custom of in regard to that. West of this opening that has been spoken of there is a highway crossing. I am unable to state the distance. It is on the same grade. I think it is about at the foot of this grade, and not far from 3-quarters of a mile west of the bridge, perhaps a mile. The purpose of this opening, I suppose, is for a farm
98 crossing. East of this opening, 750 feet, is the canal bridge. There is no floor across that; that is, if you mean by "a floor" a plank, a close floor, I say there was none. There is a highway crossing under the same bridge that crosses the canal.

This witness was then cross-examined by Mr. Smith, counsel for plaintiff:

It is proper to leave these cattle openings uncovered, because it is not necessary for the purpose of conveying the trains to have it covered.

Q. Suppose they are in the habit of stalling cattle trains right over that in the night time there, would it not be of some use to have it covered, or do you mean to have the jury understand you think it best to have a man-trap there?

A. I mean to have the jury understand precisely what I say, that it is not necessary to have them covered, and it is perfectly proper to have them uncovered.

Q. Although trains are stalled over there in the night time, do you mean to tell them that it is proper?

I mean to tell them precisely as I have told them.

FRANCIS A. UTTER was next sworn on behalf of def'ts, and examined by Mr. Fairchild, counsel for defendants:

99 My business is civil engineer. I have been in that business 25 years on the State canals and the Hudson River R. R. I was engaged upon the New York State canals some 4 years; upon the Hudson River Road something over 15 years. I am somewhat acquainted with this locality that has been spoken of. I passed over there frequently. I think that work is constructed in the way in which such works are usually constructed on railroads. It is customary to cover such farm openings on the Hudson R. R., and, so far as I have observed, on other roads it is not customary. I am somewhat familiar with the New York Central in the vicinity of Utica, and with the road leading north from Albany to Cohoes, and somewhat with the Troy end of the Boston Road, a short distance, and somewhat with the Albany & Boston Road in the vicinity of Greenbush. Such openings are usually left uncovered upon those roads. There are several reasons for it. In the first place they are usually kept open on account of their lasting longer, the timbers not so much exposed to the weather, consequently it will last longer. Another reason is they served as cattle guards, and they also prevent the track becoming a thoroughfare for people walking along the

100 track. If they were covered, people would be much more likely to violate the statute and walk upon the track, and if they were covered cattle might get upon the road and pass over them. In this case, if this was covered, cattle might pass over it on to the canal bridge, and consequently go through into the canal. I should think, situated as this opening is, it ought not to be covered under any circumstances. I should think it would be considered as serving the purpose of a cattle guard.

This witness was then cross-examined by Mr. Smith, counsel for plaintiff:

Q. Suppose the company fence the road on each side, how are cattle going to get up on to that embankment?

A. If the fence is opened, as they very often are.

Q. Is there any necessity of having all these openings through this embankment as a succession of cattle guards?

A. I have given no testimony in regard to any but this one.

Q. Why did you select this one? Is it because Lockwood pitched into that?

A. It is because it is next the canal bridge.

Q. How are cattle going to get over that canal bridge?

A. Suppose Lockwood's cattle had got out of the train, and
101 had walked up into this culvert, and there had been a bridge over it, the company could probably be sued for the damage, and the damage recovered.

Q. You supposed Lockwood to arrive there, and be stalled there in the day-time or night?

A. It would be immaterial, I suppose.

Q. You were anxious about the safety of the necks of Lockwood's cattle?

A. My statement was in answer to your question.

Q. You say you were afraid that Lockwood's cattle could get out and break in there and break their necks?

A. I did'nt say any such thing.

Q. You said something about Lockwood's cattle?

A. You asked me what the result would be.

Q. I asked you if that road is fenced why do you want any cattle guards there?

A. The Hudson River R. R. is fenced.

Q. If they don't fence the road, you think they are wanted there as a cattle guard?

A. There is danger of cattle going onto a track with the best of fences.

Q. That is the reason why you want that open? Do you know how many cattle guards there are west of this first one; how many openings there are there?

A. I know nothing about that.

Q. Have you ever been out there to look at it?

102 A. Frequently crossed there in cars. I never went out to look at it.

Q. In the day-time or night?

A. Both day-time and night.

Q. Why did you select this particular opening as being required to be used above all the rest?

A. Because I suppose it is this particular opening that is under consideration.

Q. This particular one is under consideration, and this particular one

has something to do with the merits of this case, and therefore you think it ought to be left open. Very well; I understand you to state, that if they were to cover over this opening it would have some effect upon the timbers?

A. Certainly.

Q. What timbers?

A. The stringers upon which the rails are placed.

Q. The covering would be under the stringer, would it not?

A. No, sir.

Q. They could have it under it?

A. They could, but that would not be a mechanical way of doing it.

Q. Why not? What is the necessity of building a bridge up over the stringers?

A. These stringers rest on the abutment.

Q. Why not lay the plank right down on the abutment; and how does that water rot the timbers?

103 A. That could be done, but if it was made a deck—

Q. We don't want any deck there?

Mr. Strong read in evidence on behalf of defendants, the testimony of Merrel Spaulding, taken on the former trial as follows:

MERREL SPAULDING, a witness for defence, being duly sworn, testified:

I am an agent for the New York Central Railroad in New York; I have been in the employ of this road since 1855; I have during that whole period been acquainted with their freight business and freight charges.

Q. Has their rate for first-class freight been higher than $70 a car load between Buffalo and Albany.

A. It has never been as low as $70 a car on first-class.

Cross examined:

Q. What freight constitutes what you are pleased to denominate first class freight?

A. Well, it is composed of a variety of articles.

Q. COURT. Does it embrace cattle?

A. Yes, sir.

Q. PLAINTIFF. What is the first-class rate for carrying cattle; what was it in June, 1856?

A. I can't tell you the exact figures; these rates are established by the general freight agent; the general freight agent in June, 1858, was Solomon Dullard; his office is at Albany, and my office is here;

104 all kinds of live stock are first-class freight; I can only state from general recollection what the freight was per load from Buffalo to Albany in June, 1858; I think it would be from $135 to $140 per car; any time during 1858 that would be the charge on ten tons of freight.

Q. How did you get that information?

A. I got it from the published tariff of the road.

JAMES DUMBAR was then sworn on behalf of defendants, and was examined by Mr. Fairchild, counsel for defendants:

I was the conductor of this cattle train; I am now in the employ of the New York Central R. R. Co., in the capacity of passenger conductor; I have been employed for the defendant ever since 1843; I left the cattle trains about 8 or 9 years ago; I cannot say positively; previous

to that I was engaged as a conductor of the cattle trains, freight and cattle and everything, from Syracuse to Albany, since the consolidation of the several roads from Albany to Buffalo into the New York Central road, May, 1853; I run over this part of the road where this accident occurred from May, 1853, up to the time I took a passenger train, as conductor of a freight and a cattle train, over this part of the road; four times over the road in a week, up and down; go up one
105 day and come down the next one. There are three of us on the rounds; I ran twice a week, four times over the road; made two trips a week; I am familiar with the locomotive that was drawing the train on this occasion; the number of it was 66; I had known her ever since she was built and came on the road; she has been running on the road; I don't know whether it is 2 years or 3 years before this accident; I could not be positive about that; I would not say. This locomotive was calculated to draw that head train every night; it did so, without it was broken down; it always drew me; I could not say whether it was used every night; it might break down and could not be used, but when it was there, and in good order, it ran the first stock train down. During that 2 or 3 years it drew my train over the road; I don't know whether it missed two or three times; I am unable to say; it was calculated to draw it down every night; that engine was put on the road on purpose on that train; I had on this train that night 34 cars and a coach; I think it was 34 and a coach, and that makes 35. That was not an unusual load for that locomotive; I had had more behind her, 38 and a coach, making 39; It had drawn up over this grade where this accident occurred, 40
106 cars; the reason that it stopped that night was, it was a very dark night, and it rained a little, just enough to wet the track; it was slipping. That was the first time that locomotive stalled with me; that was the first time I had ever known it to stop with me; I was detained there that night not to exceed twenty minutes; there were following me, I think it was 4 trains—4 or 5, 4 certain—cattle and freight trains together; there may have been some freight on the other train, but I don't know; my train was all live stock except the coach.

Q. How did you get up the grade that night?

A. Sent my breakman back to stop the train, and the train came up and I coupled into him, and he shoved us over the grade.

Q. Is that the usual way when a train is stalled to rely upon the locomotive following to help it?

A. No, sir; we take and give him slack chain, and we take the coach and put a piece of soft wood, hemlock or some other kind, under the wheel, and the brakeman on the second car has a break on, and lets the cars all come together, and then he (the engineer) blows to let off the break, and the very time he lets off the break the engineer starts the engine, and he gets up the hill; I give him a slack chain, and sometimes we have to do it twice. Where a train is
107 stalled as this one was, we sometimes take a block, as I said before, to put under the coaches hind wheel, and he backs his train together, and the very minute he blows "off brake," he gets a slack chain. If you have got a train right behind you, and you are satisfied you cannot start it, you get that to help you. That is the way we do it when we get stuck; the first thing—always do that. On this occasion when I stopped I put the block under it and tried one wheel, and they could not make us go; and the train was so close to us I stopped and let the second engine come into mine. The following engine pushed me up. I had two brakemen this night on this train. Each of these brake-

men had a light. It is necessary for them to have a light, in order to do their work; they have a light to go over the top of a train, to see whether there is a broken wheel, a broken shaft, or anything wrong about the trains, and to go back to stop approaching trains in case you break down. A brakeman would give a signal to an approaching train, to let him know you stood on the track, by swinging a light across the track the train stands on; a lantern is necessary for that purpose. I sent one of the brakemen back to stop the approaching train; sent him back to swing the light across the track and warn him, so that he would
108 not run into me. It is necessary a brakeman should have a light for that purpose, a white light and a red light. The other brakeman was on the top of the train—on the top of the freight cars. The brakemen ride when the train is in motion in a coach, and stand by the door, one to the east end and one to the west end. I don't think I have ever been stalled on that grade over 3 or 4 times; I would not say certain; I don't think I ever was, and I don't think I ever have that. Whenever we were stalled, the reason was what we call a bad track; just rain a little, to make it slippery—it rained a little. Either a rain or a frost will make a slippery rail; if it rains just a little it will make a slippery rail. A slight rain makes the track more difficult for a locomotive to draw a train than a heavy rain. A large rain washes the tracks nice; when it rains hard, it washes the track off. You can run better when it is washed off than you can when you have a dirty track—better than you can with a slight rain. When it rains slight, you slip, and when it rains hard, it washes the dirt and grease off. The size of this engine was 22 by 17. She is what is called a 22-inch stroke by 17-inch cylinder. The majority of
109 them are 16 by 22, and this was built on purpose for a heavy drag, 22 by 17. It is an uncommonly powerful locomotive; it is adequate to drawing such a train. This locomotive was generally sufficient to do the work it was called upon to do that night. I had a light that night. I was at the west end of the train. I put a block under the wheel. I was out on the road. There were three lights upon this train upon this occasion. That is all that belonged to me, two brakemen and myself. Each brakeman had a light, and I had one. Those are the only lights that belong to the company on the train. The brakeman on the top of the train was there to put on the brake when the whistle was blown. He sat on the top of the car next to the last one, to put on the brake when he blows "off brakes." The brake-wheel is on top of the car; that is his place. He could not put on the brake without going on the top of it, because I had the coach brake myself; I used that. It is necessary for each brakeman to keep his light at all times; would not do for him to lend his light to a drover to go along the track. At a station, it would be different, where the work was done, but on the road we don't lend the lights when we are running. It is their business to look at the train first in all cases. During the whole time we were stopped
110 there, we were engaged in efforts to get up the grade to go ahead. I don't see how the brakeman on top of the car had any opportunity of knowing whether cattle were down in the middle of the train. He sat on top of the second car. If he had not been in the middle, how could he tell? He sat on the second car, on the top, by the brake. The object is to get the brake as close to the end as you can. You cannot give them a slack chain in the end of the car. You must do it in the middle to give them a slack. This brakeman didn't go into the first or second car from the engine. The brakeman that I sent back did not come into the car. When he came up with the engine, he stopped the second

train, understand, and he coupled that engine into the coach, this hind brakeman. One was sitting on the freight car, and one went back to stop the engine. He had to couple the engine into the caboose, or coach, rather. Then we had to put Lockwood on. We started when we got Lockwood up, and put him into the coach—we were ready to start.

This witness was then cross-examined by Mr. Smith, counsel for plaintiff:

111 I could not tell how many drovers were in that caboose; I do not know how many there were, but I will say six; I think there were, but I could not say positively. We got stalled, and took slack once—we slacked back once; I think not more than once. I think not, because the second train was so close. I know we were not there over 20 minutes, because we were only 15 or 20 minutes apart—the two trains. I went down with Redman to fetch Lockwood up. We found him lying on his face. I helped to put him on Redman's back. Mr. Kelsey went also. I went down to help. I suppose I did help to hold him on his back. I got him into the car. The other train was ready to start, as I said before. We were ready to start, and we then had to go down to get Lockwood. The other engine had come up, and we were ready to start. I cannot tell how long we were on the ground. I don't think we exceeded 20 minutes. I was on the ground there, blocking up the hind wheels of that coach, not more than two or three minutes. We did not jerk but once. I knew there was an opening there in that road. It was a very dark night.

Q. Do you mean to swear to this jury that that brakeman did not come in there, and tell the drovers that their cattle were down

112 and required attention?

A. I said so before.

Q. How do you know he did not?

A. I saw him the same as I see you now.

Q. You were at the end of the caboose?

A. I was there to block that wheel. All he had to do was to put the block under it, and I would stop it.

Q. You saw the brakeman, you swear, until the engine came up?

A. He sat on the end of the car. I say I saw him up there, and he sat on that car.

Q. Did you see him all the while?

A. I did not say that.

Q. Was it the west end of the last car where he was sitting?

A. Next the last car. The coach is the last car.

A. Was he there all the while? did you see him there all the while?

A. I could not say I saw him every second, because I was around. He was there, and put on the brake when I put the block under it. As soon as the train came up, we were ready to go on.

Q. How did you find out there was a man down in that gulf?

A. I think Kelsey came, and told me when I was ready to go, there was a man laying there.

Q. Did you go down there?

A. I did, with Redman.

Q. And brought him up?

113 A. Yes, sir.

Q. Where did you put him?

A. Put him in the caboose or coach.

Q. Where did you go with him?

A. Canastota.
Q. What did you do with him when you got down to Canastota?
A. Took him to Mr. Toby's hotel.
Q. Did you do anything for him?
A. Had a doctor sent for; I don't know what the doctor's name was; I suppose that one was here—the witness.
Q. What did you do next?
A. I went right off.
Q. That is all the attention you paid to Lockwood?
A. We left him in the care of our agent, Mr. Toby.
Q. What instructions did you give him?
A. To get a doctor and do all he could.
Q. Did you give instructions to have him provided for?
A. No, sir.
Q. What did you do with his cattle?
A. Took them to Albany. I gave the bills to the freight agent and he took charge of them.
Q. Do you know that all accidents on that road are reported to the State engineer?
A. No, sir.
Q. What report did you make of this accident?
A. I made a report to the company that a man fell down.
114 Q. What words did you use; what sort of a story did you tell about it?
A. I reported that a man fell down there.
Q. How fell down; did you report that man was walking along the track in the night season; in the first place did you report his name to the company?
A. Yes, sir.
Q. What did you call him?
A. Charles Lockwood.
Q. Did you report it in writing or verbally?
A. Well, I reported by writing.
Q. That Charles Lockwood had done what?
A. Fell into one of them holes there, or cross roads, or whatever you have a mind to call it.
Q. Did you tell the company that he was walking there in the night-time, and fell into an open culvert?
A. I told them he fell down in there.
Q. How many bruises did you report?
A. I did not report any, I said he was injured on his head or a kind of a scratch on his head.
Q. Did you not use this language "Charles Lockwood, while walking on the track at Canastota at night, fell through an open culvert sustaining some damage by the fall." Is that not your language?
A. I could not tell.
Q. You say that the engine was adequate to draw that load up that embankment?
115 A. Yes, sir.
Q. Do you mean to swear that?
A. I say she was large enough to draw that load. I have had more behind her.
Q. It was adequate to draw these 34 car loads of cattle?
A. Yes, sir; if it had not rained; it made the track very slippery.
Q. How much did it rain?
A. It rained a little.

Q. Did it patter?

A. It rained light rain, as I said before; it rained a little light rain; it did not come down heavy.

Q. Why did you not tell the cattle drovers there was a gulf there.

A. I did tell them so.

Q. Did you swear that on the former trial?

A. I did; I told them; I hallooed to them.

Q. When did you do that?

A. When I got off myself.

Q. You hallooed before Mr. Lockwood fell in there; do you mean to swear that you gave notice to the drovers; what sort of notice did you give?

A. I hallooed for them not to get off, that we stood over a cross road.

Q. Did you do that until after Lockwood fell?

A. When we first stopped.

Q. That, you are sure of?

A. I know it.

Q. And you know you swore to it before?

116 A. I don't know whether I did or not; I believe so.

Q. I want to know whether you told the jury, before one of those cattle drovers got off, that there was a dangerous hole there, & they must not get off?

A. I did halloo.

Q. What do you call hallooing.

A. Hallooing as you would into a car that there was a station.

Q. Where did you halloo?

A. On the platform of the car.

Q. Was the door open?

A. Yes, sir.

Q. Did you stick your head into the door?

A. No; I did not do that.

Q. Was it anything more than a whisper?

A. I hallooed to them not to get off; we stood over part of one of those holes.

Q. Which one did you stand over?

A. I think it was the first one.

Q. You swear you stood over the first one from the bridge?

A. No, sir; I mean west of the bridge.

Q. You stood over the hind end of the train; do you mean to tell the jury that you got over the first opening west of the bridge?

A. I know I stood over one opening,

Q. But which you don't know?

A. There are three, and it must have the centre one.

117 Q. And you swear that you gave notice; did you speak more than once?

A. That I would not swear.

Q. Did you see any one get out?

A. Mr. Oakman, or some such name as that, he got on the platform.

Q. Which platform?

A. The west end of the coach.

Q. Did see any one get out of the east end of the coach?

A. No, sir.

Q. You did not know any one got out?

A. No, only the brakeman.

Q. By the COURT. Did you say you did not see any one get out of the east end?

A. No, I did not; only my brakeman.

Q. By Mr. SMITH. Do you mean to tell this jury that that brakeman did not get down on to the road with his light and walk along by the side of the coach on the north side?

A. I said I did not see him.

Q. Will your swear he did not do it?

A. I will say, as I said before, that he was on the hind end of the stock train.

Q. How do you know that?

A. I saw him up there.

Q. Saw him all the while?

A. I don't pretend to say I saw him every minute.

By the COURT. Whereabouts in reference to the train was
118 the opening which you say was the centre one of the three; in what part of the train was that opening?

A. It was near the west end of the coach.

Q. Was it under the caboose?

A. Under the caboose.

Q. Directly under the caboose was one of the farm crossings at that time?

A. Yes, sir.

Q. And how did you get to the hind wheels to block them with wood?

A. I stood on a timber that laid between the two tracks.

Q. You walked on a timber that laid between the two tracks to put the wood under the hind wheel of the caboose?

A. Yes, sir.

Q. You recollect that, do you?

A. Yes, sir.

Q. By Mr. SMITH. What timber is that?

A. To walk on between the two tracks.

Q. Who wants to walk between the two tracks?

A. I do; it is for the track men, and all such men to walk on. I walk on it when I want to get off. I had to walk there when I got stalled.

Q. You walk there when you are stalled?

A. Yes, sir; between the two tracks.

Q. How long does that timber extend?

A. The whole length of the opening.

Q. Was it timber between the two tracks?

119 A. Yes, sir.

Q. Across the opening?

A. Yes, sir.

Q. By a JUROR. How far apart are any two culverts?

A. I could not say, sir; I could not tell you anything about it.

Q. By the COURT. Can you not tell whether it is 100 feet or 200 feet?

A. It may be 200 and may not.

Q. Is it all on the same farm?

A. That I don't know.

Q. By Mr. SMITH. The juror wants to know how large a portion of this train was over the east culvert.

Q. Can you give any idea of the distance between the two openings?

A. I could not, for I don't know; I never noticed enough to know.

Q. Is it a mile?

A. I don't know; but it is between two telegraph poles, and they are calculated to be 200 feet apart; I am unable to say; probably five feet; I would not say positively.

Q. Did it patter?

A. It rained light rain, as I said before; it rained a little light rain; it did not come down heavy.

Q. Why did you not tell the cattle drovers there was a gulf there.

A. I did tell them so.

Q. Did you swear that on the former trial?

A. I did; I told them; I hallooed to them.

Q. When did you do that?

A. When I got off myself.

Q. You hallooed before Mr. Lockwood fell in there; do you mean to swear that you gave notice to the drovers; what sort of notice did you give?

A. I hallooed for them not to get off, that we stood over a cross road.

Q. Did you do that until after Lockwood fell?

A. When we first stopped.

Q. That, you are sure of?

A. I know it.

Q. And you know you swore to it before?

116 A. I don't know whether I did or not; I believe so.

Q. I want to know whether you told the jury, before one of those cattle drovers got off, that there was a dangerous hole there, & they must not get off?

A. I did halloo.

Q. What do you call hallooing.

A. Hallooing as you would into a car that there was a station.

Q. Where did you halloo?

A. On the platform of the car.

Q. Was the door open?

A. Yes, sir.

Q. Did you stick your head into the door?

A. No; I did not do that.

Q. Was it anything more than a whisper?

A. I hallooed to them not to get off; we stood over part of one of those holes.

Q. Which one did you stand over?

A. I think it was the first one.

Q. You swear you stood over the first one from the bridge?

A. No, sir; I mean west of the bridge.

Q. You stood over the hind end of the train; do you mean to tell the jury that you got over the first opening west of the bridge?

A. I know I stood over one opening,

Q. But which you don't know?

A. There are three, and it must have the centre one.

117 Q. And you swear that you gave notice; did you speak more than once?

A. That I would not swear.

Q. Did you see any one get out?

A. Mr. Oakman, or some such name as that, he got on the platform.

Q. Which platform?

A. The west end of the coach.

Q. Did see any one get out of the east end of the coach?

A. No, sir.

Q. You did not know any one got out?

A. No, only the brakeman.

Q. By the COURT. Did you say you did not see any one get out of the east end?

A. No, I did not; only my brakeman.

Q. By Mr. SMITH. Do you mean to tell this jury that that brakeman did not get down on to the road with his light and walk along by the side of the coach on the north side?

A. I said I did not see him.

Q. Will your swear he did not do it?

A. I will say, as I said before, that he was on the hind end of the stock train.

Q. How do you know that?

A. I saw him up there.

Q. Saw him all the while?

A. I don't pretend to say I saw him every minute.

By the COURT. Whereabouts in reference to the train was
118 the opening which you say was the centre one of the three; in what part of the train was that opening?

A. It was near the west end of the coach.

Q. Was it under the caboose?

A. Under the caboose.

Q. Directly under the caboose was one of the farm crossings at that time?

A. Yes, sir.

Q. And how did you get to the hind wheels to block them with wood?

A. I stood on a timber that laid between the two tracks.

Q. You walked on a timber that laid between the two tracks to put the wood under the hind wheel of the caboose?

A. Yes, sir.

Q. You recollect that, do you?

A. Yes, sir.

Q. By Mr. SMITH. What timber is that?

A. To walk on between the two tracks.

Q. Who wants to walk between the two tracks?

A. I do; it is for the track men, and all such men to walk on. I walk on it when I want to get off. I had to walk there when I got stalled.

Q. You walk there when you are stalled?

A. Yes, sir; between the two tracks.

Q. How long does that timber extend?

A. The whole length of the opening.

Q. Was it timber between the two tracks?

119 A. Yes, sir.

Q. Across the opening?

A. Yes, sir.

Q. By a JUROR. How far apart are any two culverts?

A. I could not say, sir; I could not tell you anything about it.

Q. By the COURT. Can you not tell whether it is 100 feet or 200 feet?

A. It may be 200 and may not.

Q. Is it all on the same farm?

A. That I don't know.

Q. By Mr. SMITH. The juror wants to know how large a portion of this train was over the east culvert.

Q. Can you give any idea of the distance between the two openings?

A. I could not, for I don't know; I never noticed enough to know.

Q. Is it a mile?

A. I don't know; but it is between two telegraph poles, and they are calculated to be 200 feet apart; I am unable to say; probably five feet; I would not say positively.

Q. I am talking about the culvert into which Mr. Lockwood fell.

A. The one Lockwood fell into was east of these—it was east of the one Lockwood fell into.

120 Q. By the COURT. About what part of the train was that?

A. I say, probably, it was near the head of the train.

Q. How do you know that; why do you say "probably?" You say you were not out there at all?

A. I said I did not know how far it was.

Q. By the COURT. Can you tell how long a car is?

A. Some are 30 feet and some over.

Q. How long were those cars that night?

A. Probably 35, 32, or 33 feet.

(Mr. Fairchild here stated, and the pl'ff's counsel admitted, that the first culvert or opening, as it is called, is 775 feet west of the canal bridge. The second one is 650 feet west of that one. Those two east culverts are 650 feet apart. The next two are 1,050 feet apart.)

A JUROR. We want to know how long that train was.

Q. By Mr. FAIRCHILD. What is the length of each car?

A. Some 30 feet and some over.

Q. What is the average length of the freight cars?

A. Probably they will average 32 or 33 feet; I could not tell what cars they have got, because they have got all lengths of cars. Some are shorter and some longer.

Q. By Mr. SMITH. It was a very long train?

A. Yes, sir.

Q. By Mr. FAIRCHILD. It was a train of 34 cars, which averaged about 33 feet in length?

A. Yes, sir.

121 BENNETT STOUTENGER, sworn on behalf of the defendants, and examined by W. Fairchild, counsel for the defendants, testifies:

I am a locomotive engineer; have been in that business the last 14 years—13 or 14—on the New York Central Railroad, between Syracuse and Utica; when the accident to Lockwood occurred, I was following the first train; I was engineer on the second stock train; I helped push Dunbar's train up the grade; my train and the one that preceded me could not have been to exceed 20 minutes apart; I was in sight of them for the last three or four miles before I came up to them; I tried to follow them right along; the length of track straight after you get to the foot of this grade west of there is from three to four miles; it is about three miles from the bridge to Chenango, and about a mile from there to the next curve—about 4¼ miles; the next curve is Poole's Brook; I could see the light on the rear end of that caboose on that straight track before we got to it. I am acquainted with locomotive No. 66, that was drawing Dunbar's train; I had ran it previous to this accident; the locomotive is a very strong one, the strongest one we had on the road, or on this division; it was competent to draw 34 cars, unless the track got slippery; under ordinary circumstances it was capable of drawing them; I have known it to draw more than 34 cars up this very grade; I have drawn 50 up there with it, with the same locomo-

122 tive; I have drawn them from Syracuse to Utica in 3 hours and 40 minutes, 20 minutes less than my time; the usual time for that distance is 4 hours; the distance from Syracuse to Utica is 53 miles, as called; I could not tell how often, during the 13 years I have been running over this division, I have passed over this grade where

this accident occurred—I calculate twice over it for a day's work; we would average twice; sometimes we would go three times; I have gone over it five times; during that whole time I have passed every day twice a day over this grade; it would average twice a day; during that time I have drawn a train east over this grade half the time; we have to go down every time we go up; during the whole time I don't recollect that I ever was stalled there but twice; I was stalled there with engine No. 36, the one I had when I was following this train, and another engine, No. 55; the locomotive which I was using was No. 36; she was from 15 to 20 cars less power than engine 66; with that locomotive I was stalled there, and with locomotive No. 55; when I was stalled up there I had 35 cars; she was 15-inch cylinder; she was less powerful than No. 66; two inches smaller cylinder; on this occasion, when Mr. Lockwood was injured, in my part of the train there were 30 cars, I think; when I helped Dunbar's train up over the grade I took my locomotive off from my train; I cut loose from my train and shoved them over, and then went back after my train; my locomotive drew my
123 train over it; we had sand; they got slipping after they left Syracuse, and got out of sand; that is what bothered them on the train; the first engine got out of sand; that is what the engineer told me after we got to Utica; I asked him how he came to get stalled, and he told me he got out of sand. The process by which we start a train which is stalled is, we take slack on, as we term it; have them set the brake or block the hind car, and go back and start, and by the time we start we blow a whistle, so that they will let the brake off by the time we get the slack up; it is the usual process; we dare not jerk very heavy; it is the usual way; we have sometimes to do it when on a level, when we have the slack all taken up, in order to start them; I have drawn a passenger train the last two or three years I ran; I was on a passenger train most of the time; with a passenger train I have been stationed where I had the slack all taken up, and had to slack up in order to get started; it was when we were at a station; at a station and on the level, when the train is all stretched out, when starting the locomotive you have to start the whole train at once; if the locomotive stops her power, she is not able to take up a position to slack back, and then she would get the power; when she stands in a certain position she only works on one side of her; when the slack is all taken up, or when we first start, when we get a little motion the engine gets more power, and when she passes over, if she stands in a certain
124 position on one side, she is on a centre on one side and on the quarter on the other, she will take steam on one side; she is like half an engine, and if we start back she can start better; as soon as she passes that centre she works both sides; I have been off the track, and I have taken one car and shoved it back and ran it up against the car in order to get them on.

CHARLES BAIRD, sworn on behalf of the defendant, and examined by defendant's counsel, testified:

I am a locomotive engineer, and have been in that business a little over 23 years; I have been 14 years on the Central Road steady; I was on it one year, and I was off a year and a half; I was 14 years last fall on the Central Railroad; it was 16 years in May last since I went on it, and I was off there on another road a year and a half; previous to that I was on the Saratoga and Whitehall Railroad for about two years; I was on the Hudson River Road a little over a year, and my first engineering was on the Boston and Worcester Road; I know this locomotive

No. 66; I have ran it; I have ran it over a year at one time—a little over a year, about 15 or 16 months; it was my regular engine between Utica and Syracuse, over this part of the road where this accident occurred; it was previous to this accident, with this locomotive, I went over this part of the road during those 15 or 16 months, nearly twice a day each way; I drew all the freight
125 trains and stock trains; always drew stock and freight trains; I drew in a train sometimes more, sometimes less cars; I have drawn as many as 39; the usual train would be from 33 or 36 to 38 or 39; I don't consider 34 cars an extraordinary train, an uncommonly heavy train for this locomotive; the most that I have drawn up this grade with this locomotive that I recollect of is not more than 39; they were loaded cars, all loaded cars. The mode of starting a train that is stalled is to give a signal for the conductor or the man by him to hold the rear end of the train; then he backs until you get the slack, and then starts, gradually at first, and then get under headway, and then give it the whole force of the steam; that is the usual way—to start slowly at first. On the night of this accident, I don't recollect which way I was; I was not on the road at the time.

Mr. SMITH. Is the gentleman willing to admit that Mr. Dunbar, on the previous trial, did not state anything about giving notice to the cattle drovers before they got out that there was a dangerous place ahead?

Mr. FAIRCHILD. Yes; I am willing to admit, in connection with the fact, that I did not ask him on that subject?

The defendant here rested.

JOHN REDMAN, recalled by plaintiff, was examined by Mr. Smith, counsel for plaintiff, and testified:

126 At the time we were there on that embankment that night, it did not rain; I know that; I know it did not rain; if it did, it did not wet the cars; I was out on the top of the cars after the accident; it had not rained before we got there; I was sitting down on the seats in the caboose; when I went on to the car in front of the caboose, I sat down on the car; I did this after the accident happened; the cars were not wet; I know Mr. Dunbar; I went over the tops of the cars where my cattle were; I sat on the top of the cars; I knew Dunbar as being the conductor on that train.

Q. Did he give notice that there was a dangerous spot ahead there?

A. After the man was hurt, I moved forward to the door, and Mr. Dunbar told me not to get out, that it was a bad place; I did not attempt to go out, but he told me not to go out; I did not hear any notice given before that—it was done so quick; that caboose was not over a culvert; when it first stopped it went on the west side of the culvert; I was sitting down beside one of the brakemen when it happened; they have two brakemen on the train, and when they have *have* two brakemen, they have a head brakeman, and he is on the forward part of the train, and the hind brakeman is on the hind part of the train, and the last one comes forward and takes the turn of that brakeman,
127 and another one comes behind, and they change; whichever is on the road the longest rides in the car; the caboose was not over the culvert when we first stopped; they may have pulled it up a little nearer.

Cross-examined by Mr. Fairchild, counsel for defendant:

I don't know everything I testified to on the former trial about its

raining; I think I said it did not rain; I think I testified positively that it did not rain, because I knew it did not rain; I know it never rained, because I looked out on the end of the platform, and went forward; if it rained on the railroad it did not wet any of the cars; it was a hazy night and the stars shone a little dim in the forepart of the night, and it did not rain; there was no mist or nothing; I was not asleep when I got to this embankment; you don't catch me asleep at that time of the night; I did not go out until after Mr. Lockwood was hurt; I caught hold of the brakes, and got up on the top of the cars; after I got Lockwood in, I went out to look at my cattle; the tops of some of these cars are covered with sheet-iron, some with tin, and some are wood; I don't recollect how these were; I think these were wooden tops, most of them, and they ran a board on the middle of them—a kind of plank to walk on. I had not been out of the cars from the time I left Syracuse; not on the ground I had not, but I went to the door; were shipping for one man, and a friend of mine was with me, shipping from Chicago,
128 and I was from Ohio, and we met at Syracuse, and he said he would get on my train, and he said "You will stall there;" and he said "If you run so slow I can get on your train behind; and I don't know but what he did get on, and I am very particular about any one getting killed that way, and I reached my head out the east end of the caboose to see if he was on, and he was not, and this brakeman was going forward; he was not on the top of the car; I did not see any one; when I was three miles out of Syracuse I looked out and saw a man going towards the forward end of the train, to the engine; that was from this side of Syracuse, about three miles, I think. This accident occurred east of Syracuse; I think they said it was 20 miles east of Syracuse. This canal grade where we stalled that night is—I don't know exactly—20 or 30 miles, somewhere along there. About three or four miles out from Syracuse, I went out to see if my friend was on the train. He did not get on, but stayed behind with his cattle, and he said he would ride down to the grade where we were stalled.

By the COURT. I saw one come into the car with a light that night; the brakeman came back with a light into the caboose after they stopped.

CHARLES C. LOCKWOOD re-called. Examined by Mr. Smith, counsel for plaintiff, testified:

I knew the conductor of that train; that was the first time I
129 ever saw him that I know of; this man Dunbar was there; he did not give any notice to me or to the other drovers in the caboose that there was danger ahead; I stated on the former trial that the brakeman went on to the ground, and I followed on after; I was looking up to see the numbers on the side of the cars by his light.

Testimony closed.

Counsel for defendant presented the following requests to charge:

1st. That the act of the plaintiff in walking upon the track at a place with which he was not familiar, and on a dark night, without a light, was an act of negligence which contributed to the injury of which he complains, and therefore he cannot recover, and the verdict should be for the defendant.

The court refused so to charge, and defendant's counsel then and there excepted.

2d. That if the jury find that the plaintiff was guilty of negligence

in walking upon the track at a place with which he was not familiar, and on a dark night, without a light or otherwise, and that such negligence in any degree contributed to the injury of which he complains, in such a case he could not recover, and the verdict should be for the defendant.

The court so charged.

3d. That the plaintiff cannot recover without proof of negligence
130 on the part of the defendant which contributed to the injury.

The plaintiff has given no such evidence, and therefore he cannot recover.

The court charged the first proposition of this request, and refused to charge the concluding proposition; and defendant's counsel then and there excepted to such refusal.

4. If the plaintiff, by his own negligence, in any degree contributed to the injury of which he complains, he cannot recover. The evidence shows such negligence, and the verdict should therefore be for the defendant.

The court charged the first proposition in this request, and refused to charge the concluding proposition; and defendant's counsel then and excepted to such refusal.

5. That by the terms of the contract between the plaintiff and the defendant, on which the plaintiff and his cattle were carried, the plaintiff assumed the risk of the injuries of which he complains, and therefore he cannot recover, and the verdict should be for the defendant.

The court refused so to charge, and defendant's counsel then and there excepted to such refusal.

6. That there is no evidence that the defendant was guilty of any fraud upon the plaintiff by which he was induced to enter into the contract under which his cattle and himself were carried. That the fact that he did not read it, and that he executed it in a hurry, fur-
131 nished no sufficient evidence to justify the jury in finding that the contract was procured by fraud on the part of the defendant.

The question of fraud was thereupon withdrawn from the consideration of the jury, plaintiff's counsel waiving the same.

7. That under the contract by which the plaintiff and his cattle were carried, the defendant is released from all liability for injuries caused by ordinary negligence on the part of the defendants' servants, and that if the jury shall find the injury of which the plaintiff complains in this case, was caused by such negligence the plaintiff cannot recover.

The court refused so to charge, and defendant's counsel then and there excepted to such refusal.

The court charged the jury in relation to the matters to which such requests referred.

For the purposes of this trial the court instructs you that the agreement produced on this trial, and the pass, both of which are set out in the declaration of the plaintiff herein, are no impediment to a recovery by the plaintiff for the injury to his person if you find in his favor under the other instructions which I shall give.

Those instructions will relate to two questions—

1st. Was the injury of which the plaintiff here complains, caused by the negligence of the defendant.

132 2d. Was the plaintiff himself guilty of any neglect, on his part, of ordinary care and prudence, which neglect contributed to his injury.

The plaintiff is not entitled to recover unless he has satisfied you by the evidence that the defendants were guilty of negligence, and that

such negligence caused the injury of which he complains, nor is he entitled to recover if you find that, either in leaving the caboose or in walking along the track in the manner and under the circumstances he did or in any other particular, he was guilty of negligence which contributed to his injury.

The court then recited the claim of the plaintiff respecting the evidence insisted upon as showing negligence in the defendants causing the injury received by the plaintiff.

And the claim of the defendants insisting that the evidence did not show any negligence on their part, and added—

"This question I leave to you upon the claims of the plaintiff and defendants respectively and the evidence bearing upon the question. If you find that the defendants were guilty of no negligence causing this injury the defendants are entitled to your verdict. If, on the contrary, you find that the defendants' negligence caused the injury, then the further question must be considered.

"Was the plaintiff free from any negligence on his part contributing to the injury."

133 The court then recited the claim of the defendants insisting upon the evidence that the conduct of the plaintiff was careless and negligent, and that his negligence not only contributed to, but was the cause of the injury he received.

And the claim of the plaintiff that the evidence showed no want of care or prudence on his part, when notified that cattle were down in the train, and while he was without any warning or notice that the place was dangerous.

And on this subject the court further charged—

"This question of negligence on the part of the plaintiff, I leave to you.

"If you find that the plaintiff, in leaving the car and walking upon the track under the circumstances proved, was guilty of a want of ordinary care, your verdict will be for the defendants; but if you reach the conclusion that the negligence of the defendants caused the injury, and you also find the plaintiff free from any negligence, your verdict will be for the plaintiff."

Counsel for the defendants renewed his aforesaid requests, and the same were charged or refused as above set forth, and to each refusal the counsel for the defendants, separately, then and there excepted.

Counsel for the defendants also excepted to the submission of any question of negligence in the defendants to the jury, insisting that the evidence was not sufficient to warrant such submission.

134 Counsel for defendants also excepted to the instruction that the agreement and pass, mentioned in the plaintiff's declaration, are no impediment to a recovery by the plaintiff if the jury found in his favor under the other instructions given to them.

The issues were then submitted to the jury who rendered their verdict for the plaintiff, and assessed his damages at $15,000.

And because none of the said exceptions so offered and made to the opinions and decisions of the said circuit judge, do appear upon the record of the said trial; therefore, on the prayer of the said defendants, by their said counsel, the said circuit judge hath to this bill of exceptions, set his seal according to the statute, this sixth day of April, one thousand eight hundred and seventy.

L. B. WOODRUFF, [SEAL.]
Circuit Judge.

Correct:

TRUMAN SMITH,
Att'y for Pl'ff.
S. T. FAIRCHILD,
Att'y for Def't.
By STRONG & SHEPARD.

13 MARCH, 1871.

(Endorsed:) U. S. circuit court. C. C. Lockwood vs. The New York Central Railroad Company. Bill of exceptions. S. T. Fairchild, def't att'y. Filed M'ch 14, 1871.

135 *Assignment of errors.*

Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and seventy-one.

THE NEW YORK CENTRAL RAILROAD COMPANY, plaintiff in error,
vs.
CHARLES C. LOCKWOOD, DEFENDANT IN ERROR.

Afterwards, to wit, on the first Monday of December of the same term, before the justices of the Supreme Court of the United States, at the Capitol, at the city of Washington, comes the said The New York Central Railroad Company, by Strong & Shepard, its attorneys, and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this, to wit:

First. By the record aforesaid it appears that the judgment aforesaid given was given for the said Charles C. Lockwood against the said The New York Central Railroad Company; whereas by the law of the land the said judgment ought to have been given for the said The New York Central Railroad Company, and against the said Charles C. Lockwood.

Second. By the record aforesaid it appears that the court overruled the objections of the said plaintiff in error to the admission of testimony, and admitted testimony so objected to to the effect mentioned, in
136 each of several particulars stated in the bill of exceptions filed herein, (the plaintiff in error separately insisting as to each particular that the court below thereby erred,) to which, for greater particularity, reference is hereby made, as follows, to wit:

1. In overruling an objection to the witness Lockwood's being allowed to state what a certain brakeman, or person supposed to be a brakeman, said, on the ground that it could not affect the plaintiff in error, and in admitting the testimony so objected to.

2. In overruling an objection to the same witness's being allowed to state whether he knew anything about a higher rate of freight for cattle than $70 a car load, on the ground that such evidence was incompetent and immaterial, and in admitting the testimony so objected to.

3. In overruling an objection to the witness Solomon Kelsey's being allowed to state what was said by a person who came into the car with a light, on the ground that it could not affect the plaintiff in error, and was incompetent and immaterial, and in admitting the testimony so objected to.

4. In overruling an objection to the witness Alansen E. Herrick's being allowed to state his knowledge as to the stalling of trains on the said railroad before the accident in question, on the ground that it was incompetent and immaterial, and in admitting the testimony so objected to.

5. In overruling an objection to the admission in evidence of a report made by the said railroad company to the State engineer of the accidents which happened on its road during the year 1858, on the
137 ground that it was incompetent and immaterial, and that the statements therein were not evidence against the plaintiff in error, and in admitting the testimony so objected to.

6. In overruling an objection to the witness John Redman's being allowed to state whether he was ever stalled on the embankment where the accident occurred before the occasion in question, on the ground that it was incompetent and immaterial, and in admitting the testimony so objected to.

Third. By the record aforesaid it appears that the court refused to instruct the jury, when the defendant in error rested his case, as requested by the plaintiff in error, to the effect mentioned in each of the following particulars, as stated in the bill of exceptions filed herein, (the plaintiff in error separately insisting, as to each particular, that the court below thereby erred,) to which, for greater particularity, reference is hereby made as follows, to wit:

1. In refusing to instruct the jury that the contract evidenced by the pass and the cattle release was a defence, and precluded a recovery in the action.

2. In refusing to instruct the jury that there was no evidence of negligence on the part of the plaintiff in error, which in any degree contributed to the plaintiff's injury.

3. In refusing to instruct the jury that the defendant in error was guilty of negligence, which contributed to his injury.

138 Fourth. By the record aforesaid it appears that the court refused to charge the jury, as requested by the plaintiff in error, after the testimony was closed, to the effect mentioned in each of the following particulars, as stated in the bill of exceptions filed herein, (the plaintiff in error separately insisting, as to each particular, that the court below thereby erred,) to which, for greater particularity, reference is hereby made as follows, to wit:

1. In refusing to charge the jury that the defendant in error was guilty of negligence in walking on a dark night, without a light, upon the track, in a place with which he was not familiar, and therefore could not recover.

2. In refusing to charge the jury that the plaintiff in error was not guilty of negligence, and therefore the defendant in error could not recover.

3. In refusing to charge the jury that the defendant in error was guilty of negligence in such a degree that the verdict should be for the plaintiff in error.

4. In refusing to charge the jury that, by the contract on which the defendant in error and his cattle were being carried, he assumed the risk of the injuries in question, and could not recover.

5. In refusing to charge the jury that, under said contract, the plaintiff in error was released from all liability for injuries caused by ordinary negligence on the part of its servants; and that, if the injuries in question were occasioned by such negligence, the defendant in error could not recover.

139 Fifth. By the record aforesaid it appears that the court charged the jury to the effect mentioned in each of the following particulars, to which the plaintiff in error objected and excepted, as stated in the bill of exceptions herein, (the plaintiff in error separately insist-

ing as to each particular, that the court below thereby erred,) to which, for greater particularity, reference is hereby made as follows, viz:

1. In submitting to the jury any question of negligence, on the part of either party, the plaintiff in error claiming that the evidence showed that the defendant in error was guilty of negligence, and the plaintiff in error was not.

2. In instructing the jury that the agreement and pass mentioned in the declaration were no impediment to a recovery by the defendant in error.

3. And the said plaintiff in error, by its attorneys aforesaid, here pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid appearing, may be reversed, annulled, and altogether held for nothing, and that the said plaintiff in error may be restored to all things which it hath lost by reason of said judgment.

STRONG & SHEPARD,
Attorneys for the Plaintiff in Error.

140 (Endorsed:) U. S. Supreme Court. The New York Central Railroad Company, plaintiff in error, vs. Charles C. Lockwood, defendant in error. Assignment of errors. Strong & Shepard, att'ys for plaintiff in error. 90 Broadway, N. Y.

Service of a copy of the within is hereby admitted.

New York, March 25, 1871.

TRUMAN SMITH,
Att'y for Def't in Error.

Filed March 27, 1871.

THE N. Y. CENTRAL R. R. COMPANY, PLAINTIFF in error,
vs.
CHARLES C. LOCKWOOD, DEFENDANT IN ERROR.

141 Supreme Court of the United States of the December term of the court aforesaid, in the year of our Lord one thousand eight hundred and seventy-one.

And thereupon afterwards, to wit, on the first Monday of December A. D. 1871, the said Charles C. Lockwood, by Truman Smith, his attorney, freely comes here into this court, and saith that there is no error either in the record, bill of exceptions, or proceedings aforesaid, or in the judgment aforesaid, and he prays that the said Supreme Court of the United States, before the judges thereof now here, may proceed to examine as well the record, bill of exception, and proceedings aforesaid as the matter aforesaid assigned for error, and that the judgment aforesaid in the form aforesaid may be in all things affirmed.

TRUMAN SMITH,
Counsel and Att'y for Defendant in Error.

142 (Indorsed:) U. S. Supreme Court. The N. Y. Central R. R. Co., plaintiffs in error, vs. Charles C. Lockwood, defendant in error. Replication by defendant in error to assignment of errors by the plaintiffs in error. Filed April 8, 1871. Truman Smith, att'y for defendant in error.

143 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York in the second circuit.

THE NEW YORK CENTRAL RAILROAD COMPANY, plaintiff in error,
vs.
CHARLES C. LOCKWOOD, DEFENDANT IN ERROR.

Know all men by these presents that we, Horace F. Clark, of the city of New York, and Augustus Schell, of said city of New York, are held and firmly bound unto the above-named Charles C. Lockwood, in the sum of twenty thousand dollars, to be paid to the said Charles C. Lockwood; for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the twentieth day of March, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-named The New York Central Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named The New York Central Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

H. F. CLARK.
AUGUSTUS SCHELL.

Sealed and delivered, and taken and acknowledged this 20th day of March, 1871, before me.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

144 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Horace F. Clark and Augustus Schell, being duly sworn, severally depose and say, and each for himself says, that he is worth the sum of forty thousand dollars, over and above all his just debts and liabilities and property exempt by law from execution.

AUGUSTUS SCHELL.
H. F. CLARK.

Sworn to this twentieth day of March, A. D. 1871, before me.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

(Indorsed:) Vol. . Page . U. S. circuit court. The New York Central Railroad Company vs. Charles C. Lockwood. Bond for costs on writ of error. Strong & Shepard, att'ys for pl'ff in error.

I approve the within bond.
New York, March 21, 1871.

SAM'L BLATCHFORD.

Filed this 21st day of March, 1871.

145 United States Supreme Court.

THE NEW YORK CENTRAL RAILROAD COMPANY, plaintiff in error,
against
CHARLES C. LOCKWOOD, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *ss:*

To CHARLES C. LOCKWOOD, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the 1st Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The New York Central Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-one.

SAM'L BLATCHFORD,
District Judge.

146 (Indorsed:) U. S. Supreme Court. The New York Central Railroad Company, plaintiff in error, vs. Charles C. Lockwood, defendant in error. Citation. Strong & Shepard, att'y, for pl'ff in error, 90 Broadway, N. Y.

Due personal service of a copy of the within citation is hereby admitted.

Dated New York, March 21st, 1871.

TRUMAN SMITH,
Att'y for Def't in Error.

Filed M'ch 21, '71.

(Indorsement on cover:) No. 548. The New York Central Railroad Company, plaintiff in error, vs. Charles C. Lockwood. S. New York C. C. U. S. Filed 17th June, 1871.

Supreme Court

OF THE UNITED STATES.

No.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

against

CHARLES C. LOCKWOOD,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Error to the Circuit Court for the Southern District of New York, to review a judgment upon a verdict, in favor of the defendant in error.

The action was brought to recover damages for personal injuries occasioned by the alleged negligence of the plaintiff in error.

PLEADINGS.

The declaration contains two counts.

The first count alleges that the defendant in error, shipped thirty cattle upon a cattle train of the plaintiff in error, to be transported from Buffalo to West Albany, and took passage himself in the same train to be carried

over the road for a certain fare or reward paid by him to the Railroad Company. That at an ascending grade of the railroad in the town of Lenox, where the road was carried over the Erie Canal, there was an opening for a farm crossing, through the embankment which constituted the road bed, which was not covered or lighted. That by reason of the inadequacy of the engine of the plaintiff in error, the said cattle train was stopped upon said grade. That by the jerking of the cars, occasioned by the efforts made to start the train, several of the cattle of the defendant in error were thrown down, of which he was notified by a servant of the Railroad Company; whereupon he got off from the train, and attempted to pass along the railroad to the cars containing his cattle; in doing which, without negligence on his part, he fell into the aforesaid opening, and received the injuries complained of.

The second count refers to the same occurrence. It sets forth, at length, a written agreement and a pass, forming the contract under which the defendant in error took passage with his cattle upon the aforesaid train, expressing a waiver of all claims for damages for injuries from whatever cause. It further alleges that Lockwood was induced to enter into this contract by fraud and deceit.

The negligence complained of is substantially the same in both counts, and is alleged to consist in the unnecessarily severe character of the grade of the railroad; the leaving of the opening through the embankment uncovered and without a light in the night time; the using an engine inadequate in power to draw the train up the grade without stopping; the process employed of starting the train by successive efforts, resulting in the throwing down of the cattle, and the failure of the plaintiff in error to give notice to the defendant in error of the existence of the opening in the embankment.

The plea is the general issue.

(Transcript of Record, fols. 2-19).

FACTS.

The evidence which is set forth in the Bill of Exceptions (fol. 23) discloses the following facts:

On June 5th, 1858, an agreement in writing was entered into between the parties, at Buffalo, in the State of New York, for the transportation by the Railroad Company of two car loads of cattle belonging to the defendant in error, from Buffalo to West Albany. The defendant in error was to accompany the cattle to take charge of them. This agreement (fols. 12, 13) provided among other things, as follows: "Whereas the said New York Central "Railroad Company transport cattle * * only at "first class rates, as per tariff, excepting in the following "cases, viz.: When they transport them at a reduced "rate in consideration of the owner or shipper assuming "certain risks as specified below: Now in consideration "that the said railroad company will transport for me "such live stock at the reduced rate of seventy dollars "per car load * * * the said C. Lockwood does "hereby agree to take the risk of injuries which the "animals or either of them may receive * * * and "it is further agreed * * that the persons riding free "to take charge of the stock, do so at their own risk of "personal injuries from whatever cause; and this agree-"ment further witnesseth that the said C. Lockwood has "this day delivered to the said railroad company two "car loads of cattle to be transported to West Albany on "the condition above expressed.

"E. CLARK, Jr., Station Agent.
"CHARLES LOCKWOOD."

As part of the same transaction the defendant in error received a pass as follows:

"New York Central Railroad Stock Drover's Pass.

"June 5, 1858. Good only on stock train to Albany "of this date.

"I certify that the bearer, C. Lockwood, has shipped "on behalf of himself, the quantity of stock which "entitles him to pass free to West Albany. The con- "ductor of the train on which this stock is carried will "therefore pass the bearer at his own risk to West "Albany, taking up this pass before arriving at the place "of destination. The acceptance of this pass is to be "considered a waiver of all claims against the railroad "company for personal damages and injuries received "while on the above train.

"E. CLARK, Jr., Agent."

"Buffalo Station."

The reduction from the regular tariff rate allowed "when the drover goes along and takes care of his cattle "and takes the risk," was at that time fifty per cent. (fols. 90, 91, 104); the rate charged for freight being always affected by the amount and nature of the risk assumed (fols. 93, 94).

The train in question proceeded in four parts, the first section, consisting of 34 cars and a caboose, carried Lockwood's cattle, he riding in the caboose. The engine, known as No. 66, was comparatively new (fol. 105), "un- "commonly powerful," "built on purpose for a heavy "drag" (fol. 109), and "the strongest on the division" (fol. 121). The number of cars in the train was not unusual or excessive, and the engine had never before failed to pass over the road without stopping, though often more heavily loaded than on the present occasion (fols. 106, 115, 122, 125).

About two miles west of Canastota, the road was carried over the Erie Canal. The embankment, necessary for this purpose (fol. 64) was properly constructed (fols. 96, 97), and the grade of the ascent did not exceed 30 feet to the mile (fol. 98).

Through this embankment three openings had been cut for farm crossings, necessary, and properly made

(fols. 61, 64, 96 to 100). The openings were crossed by sleepers, on which the rails rested, and were not otherwise covered, being properly left open, as is usual in such cases, to serve as cattle guards, to preserve the timbers, and especially to assist the statute prohibiting persons from walking on the track (fol. 100. See General Railroad Act of New York; Laws of 1850 Ch. 140 § 44, last clause).

At about two o'clock in the morning of June 6th, the train in question became "stalled" upon this grade by reason of a slight fog, mist, or rain, which rendered the track slippery (fols. 46, 57, 106, 108, 115. But see fols. 126, 127).

When the train stopped, the rear end of the caboose was over one of the culverts, and the conductor gave notice to the drovers not to get off (fols. 115, 116).

The persons in charge of the train endeavoured to get it over the grade by a process known as "taking slack," used on every road, on all kinds of trains, and perfectly proper (fols. 25, 44, 45, 56, 58, 68, 107, 110, 111, 123. 125).

One of the brakemen on the train was necessarily engaged upon the top of the second car from the rear of the train (fols. 109, 110), and the other was sent back with a lantern to signal the second section of the train, which soon came up, when its engine was detached and assisted the first section over the grade (fols. 107, 121).

While the train was standing still upon the grade, the plaintiff claims that a man entered the caboose, and, while fixing the light in his lantern, stated to the drovers that some cattle were down at or near the centre of the train. Upon his leaving the caboose the defendant in error and another drover, Kelsey, voluntarily followed him towards the engine, walking along the other track, looking up at the sides of the cars for their numbers by the light of the man's lantern, and entirely heedless of danger, either from a train on the opposite track, from

the fact that this train might start at any moment, or from the condition of the ground on which they were walking, with which they were entirely unacquainted, and in regard to which they did not pay the least attention (fols. 27, 34, 35, 41, 42, 48, 49) until Lockwood "pitched into" one of the road crossings, and received the injuries for which the action was brought. He admits (fol. 34) "I did not look to see where I was walking."

The allegations in the declaration concerning fraud in obtaining the signature of the defendant in error to the written agreement were waived upon the trial and withdrawn (fol. 131).

There was no evidence that the cattle were, in fact, down, while the train was at the place in question, but there was evidence tending to prove the contrary. (See transcript of record, top of page 16).

The errors complained of are particularly specified in the following Points:

POINTS.

I.

The Court below at the trial, when the plaintiff below first rested the case, was requested by the counsel for the defendant below to instruct the jury, among other things (folio 87, 88.)

1. "The contract evidenced by the 'Pass' and "the 'Cattle release' is a defence, and precludes a "recovery in this action, and the jury should ren- "der their verdict for the defendant."

"The Court refused to give either of the instruc- "tions prayed for in this stage of the trial, and the

"defendant's counsel separately excepted to the re-
"fusal as to each request" (folio 88).

At the close of all the evidence, the counsel for the defendant below presented to the Court various requests to charge (folios 129 to 132), and among them,

5. "That by the terms of the contract be-
"tween the plaintiff and the defendant, on
"which the plaintiff and his cattle were carried,
"the plaintiff assumed the risk of the injuries
"of which he complains, and therefore he can-
"not recover, and the verdict should be for the
"defendant" (folio 130).

"The Court refused so to charge, and defen-
"dant's counsel then and there excepted to such
"refusal" (folio 130).

7. "That under the contract by which the
"plaintiff and his cattle were carried, the defen-
"dant is released from all liability for injuries
"caused by ordinary negligence on the part of
"the defendant's servants, and that if the jury
"shall find the injury, of which the plaintiff com-
"plains in this case, was caused by such negli-
"gence, the plaintiff cannot recover" (folio 131.)

"The Court refused so to charge, and the de-
"fendant's counsel then and there excepted to
"such refusal" (folio 131).

The Court charged the jury with relation to the matters to which such requests referred.

"For the purposes of this trial the Court in-
"structs you that the agreement produced on
"this trial, and the 'Pass,' both of which are
"set out in the declaration of the plaintiff here-
"in, are no impediment to a recovery by the
"plaintiff for the injury to his person, if you find

"in his favor under the other instructions which "I shall give."

"Those instructions will relate to two ques- "tions :

1st. "Was the injury of which the plain- "tiff here complains caused by the negligence "of the defendant ?

2d. "Was the plaintiff himself guilty of any neglect on his part of ordinary care and prudence, which neglect contributed to his injury ?" (folios 131, 132).

The Court then gave instructions to the jury on the subjects of negligence by the defendant below causing the injury, and negligence on the part of the plaintiff below contributing to the injury (folios 132 to 134), whereupon,

"Counsel for the defendant below renewed his "aforesaid requests, and the same were charged "or refused as above set forth, and to each re- "fusal the counsel for the defendant separately "then and there excepted (folio 133).

"Counsel for defendant also excepted to the "instruction, that the 'Agreement' and 'Pass,' "mentioned in the plaintiff's declaration, are no "impediment to a recovery by the plaintiff, if "the jury found in his favor under the other in- "structions given to them" (folio 134).

2. The foregoing exceptions to refusals of instructions as requested, and to the instructions given to the jury, in regard to the effect of the contract between the parties, formed by the "Stock Release and Pass" upon the cause of action, present questions as to the validity of the contract in respect to exonerating from liability for injuries from negligence, and, if valid,

as to the interpretation of the contract in the same respect, and whether it extends to protect from liability for the injury in question.

3. These questions must be determined according to the laws of New York, within whose jurisdiction the contract was made and to be executed, and the alleged cause of action accrued. If the contract would be a defence to a like action in the courts of New York, upon the like facts, it is a defence everywhere. It would defeat an action in Connecticut, of which State the plaintiff below is a citizen, or in any other State in the Union. The rights and obligations of the parties to the contract are such as arose from and were given by it under the New York laws, and must be recognized and enforced accordingly in any other jurisdiction in which they may be in question.

Chapman *v.* Robertson, 6 Paige Ch. R. 627.
Pomeroy *v.* Ainsworth, 22 Barb. 120.
Lee *v.* Selleck, 32 Barb. 522.
Balme *v.* Wombough, 38 Barb. 352.
Bowen *v.* Newell, 13 N. Y. 290.
Curtis *v.* Leavitt, 15 N. Y. 227.
Cutler *v.* Wright, 22 N. Y. 472.
2 Redfield on Railways, 4 ed. 278 § 204 b.
Andrews *v.* Pound, 13 Peters U. S. R., 65.
Willings *v* Consequa, Peters C. Ct. R. 302, 317.
Delilah *v.* Jacobs, 4 Cranch C. Ct. 238.
Knowlton *v.* The Erie Railway Co., 19. Ohio St. R. 261.

The local law of a State in which a federal court is authorized to exercise jurisdiction, forms the rule by which it is to be guided in adjudicating the rights of parties in civil actions at common

law, not arising under the law of the United States.

Livingston *v.* Moore, 7 Pet. 469.
Owings *v.* Hull, 9 Pet. 607.
Pennington *v.* Gibson, 16 Howards 65.
McNiel *v.* Holbrook, 12 Pet. 84.
Lorman *v.* Clarke, 2 M'Lean 568, 572.
Van Bokelen *v.* Brooklyn City R. R. Co., 5 Blatch. 379.

The judiciary act of Congress of 1789 prescribes this rule of decision for the national courts.

1 Stat. at L. 92 § 34.

The Court, as a general rule, must regard the decisions of the highest judicial tribunals of the State, as conclusive evidence of the law.

Mead *vs.* Beale, Taneys Cir. Ct. Decisions 339, 360.
Chicago City *vs.* Robbins, 2 Black, 428.
Jackson *vs.* Chew, 12 Wheat, 489, 496.
Gelpcke *vs.* City of Dubuque, 1 Wall 210. and numerous other cases.

4. Looking at the laws of New York applicable to the aforesaid questions in relation to the contract created by the "Stock Release and Pass," it is clear that by those laws the contract is valid to exempt the defendant below from liability for the negligence in question of its agents and servants; that it is to be interpreted as covering such negligence to that extent; and that it is a perfect defence to this action.

Bissell *vs.* N. Y. Central R. R. Co., 25 N. Y. 442. (Cause of action arose 5th Sept., 1856. See 29 Barb. 602.—Decided in Court of Appeals in December, 1862).

Perkins *vs.* N. Y. Central R. R. Co., 24 N. Y. 196. (Cause of action arose 11th May, 1858.—Decided in Court of Appeals, March, 1862).

Welles *vs.* N. Y. Central R. R. Co., 24 N. Y., 181. (Cause of action arose Sept., 1855. See 26 Barb. 641.—Decided in Court of Appeals March, 1862).

Smith *vs.* N. Y. Central R. R Co., 24 N. Y. 222. (Cause of action arose 24th March, 1855. See 29 Barb. 132.—Decided in Court of Appeals March, 1862).

French *vs.* Buffalo, N. Y. & Erie R. R. Co. 4 Keyes (N. Y.) 108.—(Decided in 1868).

By the terms of the contract, it exempts the defendant from obligation in respect to all risks to the person of the plaintiff below; and such risks are by the terms of the contract assumed by the plaintiff.

The language used on that subject is very broad, being in the "Stock Release," "that the "persons riding free to take charge of the stock, "do so at their own risk of personal injuries from "whatever cause;" and in the "Pass" that the "conductors will pass the bearer at his own risk," &c., and "that the acceptance of this Pass is to be "considered a waiver of all claims against this "Railroad Company for personal damages and in-"juries received when on the above train;" it be-"ing previously expressed therein to be "Good "only on stock train to Albany of this date."

The contract is supported by a good consideration. The transportation of the cattle at a reduced rate in consequence of the plaintiff below assuming certain risks as therein mentioned, and the defendant below furnishing him the "Pass;" and it is one which the parties might make under the adjudications above cited.

In Bissell *vs.* N. Y. Central R. R. Co., the contract was like the one in question. There was a "Stock Release" by which the Company agreed to transport certain cattle from Buffalo to Albany at the reduced rate of $70 per car load, the owners agreeing to do certain things and assume certain risks, as in the contract in the present case. It was stipulated therein "that the persons riding "free to take charge of the stock, do so at their own "risk of personal injury from whatever cause." Two car loads of cattle were shipped under this contract, and Bissell, one of the owners, took passage in a car attached to the stock train which contained them. He was furnished with a ticket headed "Cattle dealer's ticket on Passenger train," by which the Company directed its conductors to "Pass Taylor & Bissell, owners of two cars of live "stock, from Buffalo to Albany." On the back of this ticket was a printed notice that "The own- "er of stock receiving this ticket, assumes all risk "of accident, and expressly agrees that the Com- "pany shall not be liable, under any circumstan- "ces, whether of negligence by their agents, or "otherwise, for any injury to the person, or for "any loss or injury to the stock of said owners "shipped by stock or freight trains." Bissell was killed while a passenger on the Company's road under the contract, and the action was brought by his widow as administratrix for negligence occasioning his death, under the provisions of a New York statute. At the trial the judge charged the jury that if they should find that the death of Bissell was caused by the gross or culpable negligence of the defendant, their verdict should be for the plaintiff. The verdict was for the plaintiff; judgment thereon was affirmed at General Term; and an appeal was taken to the Court of Appeals, where the judgment was reversed, on the grounds that the contract for the assumption by Bissell of the risks of injury to his person, and relieving the

Company therefrom, was sustained by a legal consideration, and valid, and extended to and protected the Company against the risk in question.

Welles *vs.* The N. Y. Central R. R. Co., was an action to recover damages for a personal injury from alleged negligence, occasioning a collision between the train on which the plaintiff was riding and a freight train. The plaintiff paid no fare, but was carried under a free ticket, on which were printed the following words: "The person accept-"ing this free ticket assumes all risks of accidents, "and expressly agrees that the company shall not "be liable under any circumstances, whether of "negligence of their agents or otherwise, for any "injury to the person, or for any loss or injury to "property of the passenger using this ticket." At the trial the contract was held not to be valid so far as to exempt the defendant from liability for gross negligence. At General Term, on appeal, it was held that if there was any practical distinction between gross and any other kind or degree of negligence, that the contract was valid and effectual to protect the defendant from liability from gross as well as any other kind or degree of negligence, and the judgment was reversed. On appeal to the Court of Appeals, the judgment of reversal at General Term was affirmed, on the ground that the contract of exemption of the company from responsibility for the negligence, in any degree, of its agents, was legal, and that it covered the negligence in question.

Perkins *vs.* the N. Y. Central R. R. Co. was an action brought by a widow as administratrix to recover damages for the death of her husband from negligence of the defendant. The negligence claimed was in reference to the construction and condition of a bridge. The husband when he received the injury from which he died was a passenger in a train of the company under a "Pass,"

issued by a director of the company, expressing "Pass W. H. Perkins, Esq. (transpt. of Smith, "Perkins & Co.) as per conditions on the other "side of this ticket, to Albany and back, 1853, "unless otherwise ordered." On the back was a printed notice in the form of the printed notice on the back of the ticket in the Welles case last aforesaid. At the trial, the judge charged "that "the statute provides that when culpable negli- "gence causes the death of a party such negligence "amounts to a felony. If you shall find that "negligence in the construction of the bridge, or "in suffering it to remain in that condition, was "gross and culpable in its character amounting to "a fraud or crime, the defendant is liable notwith- "standing the condition of the pass, and you are "to determine from the evidence what the character "of this negligence was." The judgment on the verdict for the plaintiff, on appeal to the General Term, was affirmed, and the defendant appealed to the Court of Appeals. The Court decided that the agreement of Perkins, the intestate, to assume all risk of accidents, &c., and relieving the company therefrom, was valid; that it imported that Perkins would "take for himself the risk of all "accidents and injuries to his person attending his "contemplated trip in the defendant's cars from "Rochester to Albany, so far as such accidents "and injuries might result from the negligence of "the defendants' agents and servants," and the judgment at General Term was reversed.

Smith *vs.* The N. Y. Central R. R. Co., decided nine months prior to the decision in the Bissell case, was an action for damages from the negligent killing of the plaintiff's intestate while a passenger on the defendants' road. He was a passenger under a contract like those in the present and in the Bissell cases, except that the form of the Pass was, "Pass ——— in charge of cars of stock on "account of ———. Takes all responsibility as

"to the injury of himself or stock." He had two car loads of hogs in the train, and was in charge of the hogs. He was riding in an old emigrant car, unsafe by reason of having a flat wheel, to the condition and unfitness of which car the attention of the conductor was called at the time it was placed in the train. On the passage this car was thrown off the track, and the intestate was killed. At the trial, the judge charged the jury to find for the plaintiff, if the death of the intestate was caused by gross negligence on the part of the defendant, or its agents, without fault on his part, to which there was an exception. The plaintiff had a verdict, and the General Term ordered judgment thereon; and on appeal from the judgment to the Court of Appeals, the judgment was affirmed by a divided Court. One of the judges (Wright) was of opinion that a contract "which "allows the carrier to omit all caution or vigilance, "and is, in effect, a license to be culpably negli- "gent to the extent of endangering the safety of "the passenger," could not, for reasons of public policy, be sustained. He says, after stating the charge to the jury, that "it was quite as favorable "to the defendants as they were entitled to claim. "The evidence, in one view of it, in my judgment, "would not only have justified a finding of gross "negligence, but negligence of so culpable a "character that had the carrier been a natural per- "son, and not a corporation, he would have been "liable to a criminal prosecution." Two of the judges (Denio and Davies), were of opinion "that "there is no general public policy forbidding a "contract by which a railroad corporation should "be exempt from liability for the negligence of "its agents in respect to a purely gratuitous pas- "senger, but they thought that the Railroad Act "and its policy prohibit a contract for such ex- "emption with a paying passenger. They were "for affirmance on the ground that plaintiff's in-

"testate was not a gratuitous passenger." The views of Judge Denio on that subject are stated in his dissenting opinion in the Bissell case. Judge Smith was for affirmance on the ground that the negligence was that of the corporation itself. Judge Sutherland was for affirmance upon the ground stated in his dissenting opinion in the Welles case, that the contract for exemption was void irrespective of the question whether the transportation was gratuitous or for hire. Judges Allen, Selden, and Gould were for reversal, the former delivering an able opinion.

It is proper to state here that Judge Davies concurred in the decisions of the Welles, Perkins, and Bissell cases, as also did Judge Denio in the two former, and Judge Smith in the first and last of those cases.

The leading principle established by those cases is that the carrier and passenger may, for a good consideration, contract to shift the risk of loss from personal injuries to the passenger occasioned by negligence of the carrier's servants, which by the common law would be upon the carrier, from the carrier to the passenger, and that contracts like those in these cases have that effect.

The validity of contracts between the owner of cattle, or goods, transported, upon a good consideration, for the transfer of the risk of injury to the cattle or goods from the carrier to the owner, is sustained by more numerous decisions.

See cases cited in the foregoing cases.
Also N. J. Steam Nav. Co. *vs.* Merchants Bank, 6 How. 344.
York Co. *vs.* N. Y. Central R. R. Co., 3 Wallace 107.
And many other cases.

French *vs.* Buffalo, N. Y., and Erie R. R. Co. was an action to recover damages for an alleged breach of contract to carry goods. Upon the delivery of the goods to the defendant to be carried receipts were given therefor stating that they were to be forwarded to destinations therein named, and across the face of each receipt was written the words "owner's risk." In their transit the goods were injured, and the referee before whom the action was tried found that the damage to the goods was occasioned by want of ordinary care and skill on the part of the servants of the defendant. As conclusions of law, he held that the receipts were the contract of the parties; that the words "owners risk" formed part of the contract and operated to limit the defendants obligation or liability; but that this limitation did not extend to the negligence of the servants of the defendant which occasioned the injury to the goods; that negligence was not within the risk assumed by the plaintiff. Judgment for the plaintiff on the report was affirmed at General Term; and on appeal to the Court of Appeals the judgment was reversed; the Court holding that under such a contract "the carrier is liable only for damages "resulting from his own personal negligence, or "from the gross negligence of his agents or servants;" that "the term 'owner's risk' in a contract for the transportation of goods, imports "that the owner assumes the risks arising from "the ordinary dangers of transportation by the "means employed, which the reasonable and "ordinary care of the common carrier might be "insufficient to prevent, and the latter is liable "only for those dangers which with ordinary care "and prudence might be avoided."

The leading opinion in the case was by Judge Woodruff, then of the Court of Appeals of New York, now a judge of the Circuit Court of the

United States for the second circuit, and before whom and a jury the present case was tried. In the course of the opinion are the following just and forcible observations applicable to the present discussion:

"It is not argued, and it is far too late to argue, "that a party having goods to be carried is not at "liberty, if he choose, to enter into a special con- "tract with the carrier, modifying and restricting "the liability of the latter and assuming any of "the risks of the transportation, which, but for "such contract, the law imposes upon a common "carrier. The idea that public policy forbids "such contracts, and does not permit the owner of "goods to act freely in that regard, and himself to "bear any such risks, if he can thereby promote "his own interest with reduction of the price of "carriage, though at one time prominently put "forth, never had any sufficient foundation in "reason, principle, or authority, and has been "very distinctly repudiated. (See New Jersey "Steam Navigation Co. *vs.* Merchants' Bank, 6 "How. U. S. 382, 393, 417; Schieffelin *vs.* Hervey, "6 Johns. 180, and cases collected in Mercantile "Mutual Insurance Co. *vs.* Chase, 1 E D. Smith "139; Parsons *vs.* Monteath, 13 Barb 353, Angell "on Carriers, Ch. 7; Welles *et. al. vs.* The Steam "Navigation Company, 8 N. Y. 375.)"

5. There is in principle no difference between contracts exempting a carrier from risk as to personal injuries, and like contracts exempting the carrier from risks as to injuries to property.

The chief ground on which contracts of the latter class have been, and those of the former are, assailed, is that they are contrary to public policy.

In regard to contracts generally, public policy

and public law unite in support of them; and to warrant the holding of a contract invalid as against public policy, a clear, plain, strong case of necessity for the protection and preservation of the public interest must be presented.

In Chitty on contracts, 10 Amer. ed. 736, it is said under the head of "Contracts Affecting Public Policy," "Agreement is not void on this "ground, unless it *manifestly* contravenes public "policy."

Story's Eq. Jur. § 292 to 306, places the whole subject of public policy, and the theory under which Courts take cognizance of its existence, under the title of "Constructive Fraud," thus emphatically expressing that only in cases of the strongest necessity to the public good can contracts be overthrown as against public policy.

Story on Contracts, § 545, 546, "It has never "been defined by the courts, but has been left loose "and free of definition, in the same manner as "fraud. The rule may however be safely laid "down, that whenever any contract conflicts with "the morals of the time, and contravenes any es- "tablished interest of society, it is void, as being "against public policy. The enlargement of trade, "and the growth of cities, with the new and vari- "ous relations created thereby, have rendered "many species of contracts valid, which were for- "merly considered to conflict with public policy."

See also the remarkably clear exposition of Best J., in Richardson *vs.* Mellish, 2 Bingham 229, "I am "not much disposed to yield to arguments of public "policy. I think the Courts of Westminster Hall "* * * have gone much further than they were "warranted in going in questions of public poli- "cy; they have taken on themselves sometimes "to decide doubtful questions of policy; and they "are always in danger of so doing, because

"courts of law look only at the particular case,
"and have not the means of bringing before them
"all those considerations which ought to enter in-
"to the judgment of those who decide on ques-
"tions of policy. I therefore say that it is not a
"doubtful matter of policy that will decide this
" * * * if once you bring it to that the plaintiff
"is entitled to recover, and let that doubtful ques-
"tion of policy be settled by that high tribunal,
"the legislature, which has the means of bringing
"before it all the considerations that bear on the
"question, and can settle it on its true and broad
"principles. I admit that if it be clearly put up-
"on the contravention of public policy, the plain-
"tiff cannot succeed; but it must be unquestion-
"able; there must be *no doubt*."

6. The decisions above cited of the Court of Appeals of the State of New York, were made upon the law of that State as adopted and established in the progress of the law by a long course of business which had extensively prevailed (fols. 90 to 92) without objection by the Legislature, and therefore with its implied approbation.

It is no objection to the rule, as the law of the State of New York, that it had not been adopted in all the other States of the Union; for that would prohibit any advance and improvement in the common law in any State, not simultaneously accepted by all.

In fact, as is well known, important differences exist between the different States in respect to the rules of the common law, growing out of differences in the progress of society and business, and the wants of the people.

The law is not stationary. It is a progressive science. It is continually advancing by modifica-

tions, changes, additions, in accordance with the advance of society, in science, in knowledge, in improvement, in the methods, and increase in the amount of business, to meet the varying wants of the people. What vast changes and improvements in the modes and amount of business, of carriers of persons and property, have been wrought within less than an ordinary life time, by the introduction and employment of steamboats upon the ocean, lakes and rivers, and railroads throughout the country. The law applicable to that department of business, has kept pace with the business itself, and the public needs it has created. Thirty years ago the Supreme Court of the State of New York decided that "Common carri-"ers could not limit their liability, or evade the "consequences of a breach of their legal duties as "such, in respect to goods carried by an express "agreement;" on the ground that it would be against public policy to allow it. Gould *vs.* Hill 2 Hill 623. It was not until 1854 that the advance was made to the position that common carriers may limit their liability by express agreement with the owners of goods. Dorr *vs.* The New Jersey Steam Navigation Co., 11 N. Y. 485. The rule that common carriers in the transportation of property may protect themselves by contract from responsibility for negligence of their servants, could not be regarded as established until recently. And for a long period the law in its onward course has been tending to allow carriers of persons to stipulate by contract, upon a good consideration, for a similar protection from responsibility for negligence of their servants and agents. The only objection urged against it is that it would violate public policy; and this objection would equally forbid the rule, now long established, that a servant employed in any business empliedly engages to bear the risks of injuries from the negligence of fellow servants in the same gen-

eral business. That rule is very pertinent to this case. The position of the drover in view of the duty assumed by him is in the nature of that of an employee of the company, engaged, as to the cattle, in the general business of other employees. There are other analogous principles referred to in the discussions in the cases above cited, alike opposed to the idea that public policy forbids such contracts between carriers and passengers.

Such contracts as that in question are mutually beneficial to drovers and railroad companies, the drover thereby securing a reduction of the rate of transportation; and the company there by relieving itself from responsibility to the extent contracted for.

If drovers should not, from motives of self-interest, accompany their cattle on the train, and take charge of them, railroad companies would be obliged to provide men to give to the cattle all necessary attention: it is for the interest of drovers on being allowed to ride free to discharge this duty, assuming the risks; and it is for the interest of companies to carry drovers free, to be relieved from that responsibility—compensating them by a reduction of fare.

It cannot be doubted that courts have often in the past, by imposing restrictions upon parties in reference to the making of contracts as called for by public policy, greatly mistaken the public as well as private interests. In a country like this, where intelligence and enterprise so largely abound, it can generally be safely left to the citizens to make such contracts as they deem for their interests; and their interests and the public good will generally be found to be identical. The current of decisions at present tends to greater freedom and more enlightened views on this subject than in former times.

7. The New York decisions, in question, are the expression of the enlightened and able Court of Appeals of that State of the progress of the law on the subjects of them, made after careful, full discussion, and deliberate examination. It was natural that differences of opinion upon questions should, to some extent, be manifested in the decisions, but the differences are not such as to impair their weight as authority.

In the Bissell case, the latest decided, and in principle identical with the present case, there were three dissenting votes. Judge Denio dissented on the ground that the case was distinguishable from the Perkins case, in the decision of which he concurred, and which decision he admitted would control in the Bissell case if applicable. Judges Wright and Sutherland dissented, doubtless for reasons stated by them in some of the other cases, that contracts to relieve from negligence of agents were against public policy.

In the Perkins case Judge Smith only dissented, but his dissent was not on either of the points, as to the validity of the contract to release the company from risks of injury to the person of the passenger; the interpretation of the contract to embrace future risk from negligence of agents; and its being a full protection to the company againsts such risks; on the contrary he himself wrote an opinion in the case, concurring with the other members of the Court on those points; but, before final decision, his mind was brought to the conclusions that the negligence in the case was that of the company as principals and proprietors of the road, distinguishing between negligence of a principal and that of his agent; also that the contract did not embrace past negligence involved in the construction of a railroad bridge three or four years previously, or in the maintenance of the bridge.

In the Welles case, Judges Sutherland and Wright dissented; Chief Judge Selden was absent. From the views of those Judges in some of the other cases, it is apparent the latter would have concurred in the decision, if he had been present; and that the two former regarded all contracts to exempt from all liability for injuries to passengers from negligence of agents or carriers void as against public policy.

The vote in the Smith case is hereinbefore stated under subdivision 4.

8. The evidence in this case shows that drovers' contracts like that in question, embracing the "Stock Release and Pass," have been made with all drovers on the defendant's road from 1853; that in 1858 there were made about 50 a week; that the average number from 1854 to 1858 was from 30 to 40 a week, and there are more now, making probably 2,500 a year on this one road, and like contracts are used on other roads in and out of the State of New York.

9. The decisions in question were made in reference to this course of business, and the practical expression thereby of the public wants and interests. This course of business long continued had made the law of the State on the subject, and the decisions only declared it. And it would be a retrograde movement, productive of immense mischief, if this Court should arrest the course of the law in New York in this respect, and remit the courts and the public in New York to the old notion, now repudiated in many analogous cases, that such contracts are void as in violation of public policy.

Ten years have now elapsed since the decision in the Bissell case, and that decision has been acted upon in a multitude of like cases. During

all that time the Legislature of New York has not deemed it necessary to interpose to prevent the usage and the course of the law in this respect.

If public policy forbids the usage, it would be a more suitable and better remedy for the Legislature to interpose by direct prohibitory legislation.

10. The New York decisions, above stated, are equally as binding upon this Court, as upon the Courts of the several States of the Union, in reference to a question as to what is the law of New York; and, in that view, the case of Knowlton *vs.* Erie Railway Co., before cited, is very pertinent to this branch of the present case. In that case, the Supreme Court of Ohio, upon a question as to the validity of a New York contract, similar to that in the present case, for exempting the carrier from responsibility for personal injuries, recognised and applied, in opposition to the law of Ohio, the rule now contended for as the law of New York. The note in that case is "The de-"fendant is a common carrier of passengers incor-"porated by the laws of New York, and was sued "as such common carrier on account of injuries "received by the plaintiff whilst being carried as "a passenger from one point to another on de-"fendant's road, and wholly within said State. "The injury was alleged to have been occasioned "by defendant's negligence. The pleadings show "that the plaintiff was being carried gratuitously "at the time of the accident, under a contract by "which the plaintiff assumed all the risks of injury "arising from negligence, &c., and that such con-"tract is valid by the laws of New York. Held "that the validity of the stipulation exempting "the defendant from liability for negligence must "be determined by the laws of New York, within "whose jurisdiction the contract was made and to "be executed; and as the plaintiff under his con-

"tract could have no right of action in the Courts "of New York, so his action cannot be maintained "in this State."

11. It is not a question in this case whether the contract between the parties was fairly made, whether any fraud was practised, or advantage taken by the company in procuring the contract, or whether the contract was, or not, read or understood by the plaintiff below, or whether he was prevented by the company, by artifice or otherwise, from reading or understanding it. Although during the entire trial the counsel for the plaintiff below pressed the point of fraud, at the very close, upon the counsel for the defendant below presenting requests for specific instructions to the jury, the whole subject of fraud was waived and withdrawn (fol. 131).

There is no evidence of fraud or unfairness of any kind by the defendant below in the making of the contract; on the contrary, it is proved that it was fairly entered into, and understood by the plaintiff below.

That in the absence of fraud by the company, the plaintiff below must be deemed to have read and understood the contract when it was made, see

Hollenbeck *vs.* DeWitt, 2 Johns. 404.
Jackson *vs.* Croy, 12 Johns. 427.
Abingdon *vs.* Allen, 11 Wend. 374, 408, 409, 412.
Chase *vs.* The Hamilton Ins. Co., 20 N. Y. 55.

12. Nor is it a necessary question in this case, how far, as the extreme limit, such a contract restricts the ordinary common law liability of a carrier. It is good to the extent it is allowable to stipulate for the restriction of such liability, that

is within the fair import of its terms, as interpreted by the foregoing decisions. If the law allows such a restriction to any extent, but not to the full limit of its terms, as thus interpreted, it is invalid only as to the excess. The law does not, as in the case of contracts void by statute, declare the contract void. Contracts violating a rule of the common law are invalid only to the extent of such violation.

Story on Con. § 627 to 631.

13. Most manifestly, the contract extends to and embraces the risk from which the injury in question resulted. The clause in the "Stock Release" "that the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause," as interpreted in the foregoing decisions, covers the case. Fol. 13, Bissell's case 25 N. Y. 442, 451, and the other cases cited. So also does the clause in the pass (fol. 13). It covers all risks on the journey. See

Northrup *vs.* The Railway Passenger Ass. Co., 43 N. Y. 516.
Theobold *vs.* The Railway Passenger Ass. Co. 26 Eng. L. and Eq. 432.
See further subdivision 7 of this point.

No corporate negligence can be fairly imputed to the defendant below contributing to the injury.

Its road was in good condition. The grade was the same it had been for thirty years, and necessary to cross the canal; the train was properly made up; the size of the train was what had been usual for many years, and the engine was amply adequate to draw the train.

The stalling of the train at the time in question

is not proved to have been attributable to any negligence, and the burden of making that proof to entitle the plaintiff below to assert such negligence, was on him; it doubtless arose from the rails being wet and slippery, a temporary deficiency of steam, or other like cause, consistent with proper care by the defendant below.

A train drawn by that engine never had been stalled there before.

But whatever may have been the cause, there is no natural, logical, or necessary connection between the fact of the stalling of the train and the injury.

If the plaintiff below had remained in the car, as obvious prudence required, and as his fellow drover, Redmond, did, from a sense of prudence, and not recklessly and presumptiously encountered extreme peril, the injury would not have occurred.

The defendant below is not responsible for his imprudently leaving the car and walking along the track.

If some person, whether a brakeman or not, spoke about the cattle being down, and the plaintiff below thereupon left the car to go and look to his cattle, it was not the act of the defendant below, which is not chargeable for it; it did not require the plaintiff to go out; it was a voluntary act on his part, the consequences of which are chargeable to him alone.

And in regard to the opening into which the plaintiff below fell, having no covering, there was no obligation on the defendant below to have it covered. No one, other than the company's servants, was entitled to go there on the track. No protection against injury to passengers at that

point was called for; there was no ground to suppose any passenger would have occasion to go there, or be so foolish as to go there on such a night as that in question.

It never has been usual on any roads to cover openings in such places.

The process of starting the train, when stalled, was usual and proper, and not subject to just complaint. It is submitted, therefore, there was no negligence by the defendant below in respect to the matters in question.

14. Nor is it necessarily a question in this case whether the contract applies to corporate negligence of the company, as distinguished from negligence of the employees of the company in the charge of the train, or whether it applies to the higher degrees of negligence.

There was no such negligence.

15. There is a further and different reason from any before adverted to, why neither of the questions relating to negligence before mentioned, as not necessarily in this case, need not be considered.

The rulings below, under consideration, were, that notwithstanding the contract, the plaintiff below was entitled to a verdict if the jury should find the defendant below guilty of negligence which caused the injury, and the plaintiff below free from negligence which contributed to the injury; in other words, that the contract did not exempt the defendant below from responsibility, for an injury occasioned by any negligence of the defendant, irrespective of the degree, whether that of the corporation as distinguished from its employees, or of its employees in its business; and that the verdict must be for the plaintiff below,

if there was such negligence by either, the plaintiff below not being guilty of contributory negligence.

According to those rulings, aside from the injury and damages, there were but two elements essential to a good cause of action. First, negligence by the defendant below producing the injury; second, no contributory negligence on the part of the plaintiff below.

These, aside from the injury and damages, were the only questions submitted to the jury; and hence the case was divested by the Court of all other questions. The jury were told that if they found for the plaintiff below upon those questions submitted, the contract formed no impediment to a recovery by the plaintiff below.

If, therefore, the contract is effectual to restrict the common law liability for negligence by the corporation as such, or by its servants, *to any degree whatever*, the Court erred in the instructions under consideration, and a new trial should be granted.

16. That such a contract is effectual to some extent for such a purpose, and that is all it is necessary for the defendant below to claim in this case, is very clearly and strongly stated by his Honor, Judge Woodruff, in French *vs.* Buffalo, N. Y. and Erie R. R. Co., before cited. It is true that the question in that case was as to the limitation by contract of the liability of a carrier for an injury to goods; but there is no difference in principle between the case of injury to property, and the risk of personal injury, as to the right to provide by contract for a limitation of liability; and the observations of the learned judge are equally pertinent and sound to both classes of cases. He says "It is said that the law will not "suffer a man to claim immunity by contract

"against his own fraud or negligence. In Welles "*vs.* Steam Navigation Company, Mr. Justice "Gardiner says, that, though this be so, a man may "nevertheless contract against liability for the "negligence, even gross negligence, or the fraud "or felony of his agents, or those in his employ- "ment; and no sufficient reason can, I think, be "urged to the contrary; provided always the con- "tract clearly shows such to be its just meaning."

"A party may certainly consent to place the "instruments and agencies which he is employing "in his business at the service (*pro hac vice*) of "another, undertaking to set them in motion under "the scheme or plan of management which he has "established, and say 'you shall have the benefit "'of my enterprise, my machinery, my servants, "'my rules, regulations, and scheme of adminis- "'tration, but I propose that you shall take the "'hazards of everything but my own fraud or "'gross negligence, and regard me as in no respect "'insuring or guaranteeing the fidelity, or the "'prudence, diligence, or care of those servants "'whom I have no reason to distrust, but who "'may out of my personal presence, neglect their "'duty, or prove otherwise unfaithful.' There is "no sound reason for denying that if a contract is "made on those terms, and presumptively for a "much less compensation to be paid, it shall not "bind the parties. It may be safely assumed, that "in this country at least, men of business are "shrewd enough to take care of their own in- "terests, and that if a party consent to such a bar- "gain, it is because it is for his interest to do so; "he expects to make or save money by relieving "the other party from risks which he is willing to "assume; and in general his expectation is "realized. There is neither honesty nor policy in "permitting him, when a loss happens through "any of the risks he consented to bear, to deny "the binding force of his contract."

"This is now the rational view of the subject "which is recognized as law."

Why should not such a contract be held valid alike with an insurance policy against like risks? Why is not such an insurance contract between the shipper, or passenger, as much against public policy as a contract like that in question? And who would question the validity of an insurance policy against risks of negligence and unfaithfulness of agents and servants?

In no just or fair interpretation of the contract in this case, can it be held to exclude all kinds and degrees of negligence. Certainly it includes at least ordinary negligence of employees. The case last cited, and others therein referred to, are full and direct to this position.

See also the other cases hereinbefore cited.

17. The position taken by the plaintiff's counsel, that the contract does not apply to injuries not occurring on the train of cars, and while the plaintiff was riding on the train, has no merit.

"The persons riding free to take charge of the "stock, do so at their own risk of personal injuries "*from whatever cause.*"

The claim is that this clause does not cover an injury in respect to which the entire negligence imputed, is negligence connected with the management of the railroad carrying the plaintiff and his cattle, and the train mentioned in the agreement.

In the Bissell case, above cited, the train in which Bissell was seated was standing still upon a siding, and another train ran into it by reason of a misplaced switch. It was claimed that if the contract was valid, it only relieved the defendant from responsibility for negligence of the persons in charge of the cattle train. But Judge Selden

very reasonably says that if parties may lawfully enter into contracts of this nature, "there is no "danger which the party may encounter resulting "from the journey, which he may not assume the "responsibility of, and he may assume all, or any portion of it." And the contract, like that in this case, covered injuries "from whatever cause." He continues, "I can imagine no injury which the "passenger could receive as the consequence of "his journey, against which the company has "power to protect itself by contract, which is not "embraced by these terms, and which he has not "assumed."

"The terms of the contract in this case supply "what was wanting in the case of Welles *vs.* The "Steam Navigation Co., 4 Seld. 375, to exempt "the carrier from responsibility for the negligence "of agents."

The contract fairly covers all accidents occuring while the company is the carrier of the plaintiff below, "from whatever cause." It embraces the entire relation of carrier and passenger, and all risks within that relation.

The liability of a railroad company to its passengers, covers accidents arising in the course of the journey, although when the train is not in motion, or the passenger not within the car, that is, accidents from the negligence of the company.

That is the ordinary contract between carrier and passenger, and the contract in question covers like risks.

II.

1. When the plaintiff below at the trial first rested the case, the Court was requested by the counsel for the defendant below to instruct the jury, among other things.

"2. That there is no evidence sufficient to "justify submitting the question to the jury, of "any negligence on the part of the defendant, "which in any degree contributed to the plaintiff's "injury, and the verdict should therefore be for the defendant" (fol. 88).

"The Court refused to give either of the in- "structions prayed for in this stage of the trial, "and the defendant's counsel separately excepted "to the refusal as to each request" (fol. 88).

At the close of all the evidence, the counsel for the defendant below, presented to the Court several requests to change, and among them,

"3. That the plaintiff cannot recover without "proof of negligence on the part of the defendant "which contributed to the injury. The plaintiff "has given no such evidence, and therefore he "cannot recover" (fol. 130).

"The Court refused to charge the concluding "proposition of this request, and defendant's "counsel then and there excepted to such refusal" (fol. 130).

After the charge of the Court, "counsel for the "defendants renewed his aforesaid requests, and "the same were charged or refused as above set "forth, and to each refusal the counsel for the de- "fendant then and there separately excepted" (fol. 133).

"Counsel for the defendants also excepted to "the submission of any question of negligence in

"the defendant to the jury, insisting that the "evidence was not sufficient to warrant such sub-"mission" (fols. 133, 134).

2. It is respectfully insisted there was not sufficient evidence to warrant the submission of the question of negligence by the defendant below to the jury; and therefore that the exceptions above stated under this point were well taken.

That the road was properly constructed, and the grade necessary and proper, was proved by abundant professional evidence (fols. 96 to 101).

That the engine was of ample power, and had never failed to draw a train up that grade before, and had often drawn up that grade heavier trains, was fully and clearly proved (fols. 105, 106, 121, to 126).

It is no evidence of negligence conducing to the injury in this case, that on previous occasions, with engines of much less power, trains had before been stalled on that grade.

Kelsey testified to the stalling of trains there, once or twice, in two or three years (fols. 45, 47, 48). Redmond thought he knew of more occasions, but could remember only one distinctly (fols. 80, 81 to 87). Herrick, living in the neighbourhood, stated he had frequently known of freight trains stalled there (fols. 62 to 64). But this evidence does not even tend to prove negligence of the defendant below in the present case occasioning the injury. It is wholly irrelevant, and should be excluded from consideration.

The stalling of the train in this case is proved to have arisen from a mist or slight rain wetting the track, a special temporary cause. It cannot properly be imputed to negligence (fols. 105, 106, 108, 46, 57). Besides, other freight trains, properly

branches of the train in question, were just behind, which would be ready in a few moments to render all needed aid to overcome the difficulty (fol. 107, 111, 121, 123).

The remark of a person coming into the drovers' car, assuming he was a brakeman, that cattle were down and needed attention (fols. 25, 26, 39) was no invitation or direction to the plaintiff below to go out and look to his cattle; and he had not any authority whatever in relation to the subject. Leaving the train by the plaintiff below, and rashly and presumptuously walking along the track in the darkness, following a man with a lantern, his eyes upon the cars to learn the numbers, paying no attention whatever to his steps, was his own voluntary act, for which he alone in reason and justice is responsible (fols. 26, 27, 34, 35).

Leaving the opening uncovered, was proved to be usual and proper (fols. 51, 59, 64, 97, 98, 99, 100, 102).

And the process of "taking slack" to overcome the stalling, is proved to have been customary on all roads, and necessary and proper (fols. 52, 55, 56, 106 to 109, 123, 125).

It does not appear that any cattle were thrown down by the process in the present case; the evidence rather shows the contrary (fols. 35, 51, 52, 39, 42, 56).

See the next point, and also French *vs.* Buffalo, N. Y. and Erie R. R. Co., as to what is sufficient evidence of negligence to justify submitting the question to a jury.

4 Keyes 108, 115 to 120, in opinion of Judge Woodruff, p. 120 to 122, opinion of Miller J.

III.

1. When the case was first rested by the plaintiff below at the trial, the counsel for the defendant below requested the Court to instruct the jury among other things,

"3. That the plaintiff was guilty of great "negligence, which contributed to his injury, "and the verdict should therefore be for the de- "fendant" (fol. 88).

"The Court refused to give either of the in- "structions prayed for in this stage of the trial, "and the defendant's counsel separately ex- "cepted to the refusal as to each request" (fol. 88).

The counsel for the defendant below, at the close of all the evidence, presented to the Court the following requests to charge, among others (fols. 129, 130),

"1. That the act of the plaintiff in walking "upon the track at a place with which he was "not familiar, and on a dark night, without a "light, was an act of negligence which con- "tributed to the injury of which he complains; "and therefore he cannot recover, and the ver- "dict should be for the defendant" (fol. 129).

"The Court refused so to charge, and de- "fendant's counsel then and there excepted" (fol. 129).

"4. If the plaintiff by his own negligence, in "any degree contributed to the injury of which "he complains, he cannot recover. The evi- "dence shows such negligence, and the verdict "should therefore be for the defendant" (fol. 130).

"The Court refused to charge the concluding "proposition of the last aforesaid request, and "defendant's counsel then and there excepted "to such refusal" (fol. 130).

After the charge to the jury, "counsel for the "defendant renewed his aforesaid requests, and "the same were charged or refused as above set "forth, and to each refusal the counsel for the "defendant separately then and there excepted" (fol. 133).

2. The Court erred in refusing to charge as requested, that the plaintiff below by his own negligence contributed to the injury, and therefore their verdict should be for the defendant below.

Such negligence of the plaintiff below consisted

1. In voluntarily leaving the train, on a dark night, away from any regular stopping place, ignorant of the condition of the road bed and the ground in that locality, where he was liable to be run down by a train on another track.

2. In walking along the track towards the engine, without heeding where his feet were placed, but entirely intent in looking for the numbers on the side of the cars by the dim light of a lantern carried by a stranger, in advance of him, for another purpose.

This is proved by the testimony of the plaintiff below and others, and of itself, irrespective of everything else, was the grossest negligence. It was the direct cause of his being precipitated into the opening. The omission to take heed to his steps, by looking before him, was much more negligent and culpable than for a person to cross a railroad track without looking in either direction for an engine or train of cars, which would be a

perfect defence to an action for damages for a personal injury by being struck by an engine, on the ground of contributory negligence.

3. In not returning to the car when the lantern disappeared, and stumbling along in the dark, until he fell into the opening, which the man with the lantern had safely passed, and which the plaintiff below would have noticed if he had used reasonable prudence.

IV.

The several exceptions by the defendant below to decisions at the trial on questions of evidence, were well taken.

1. The plaintiff below testified as a witness, that after a minute or two from the stalling of the train in question, the conductor got up and went out; "and finally after a few trials of the jerking "process, they gave up the idea of getting up the "grade. One of their brakemen, or or least I sup- "posed he was a brakeman, for he was on the "train doing the duty of a brakeman, came in "with a lantern, and said the cattle were down. "The counsel for the defendant thereupon object- "ed to the witness stating what the brakeman "said on the ground it could not affect the R. R. "Co." The counsel for the plaintiff below then read in evidence the agreement and ticket set forth in the declaration, "and claimed that the "statement of the brakeman was admissible un- "der said agreement, to which the counsel for the "defendant objected for the reasons before stated. "The Court overruled the objection, and the de- "fendant then and there excepted to the decision" "(fol. 25). The witness thereupon testified, 'He said

"the cattle were down and needed attention. He "said the cattle in one car were badly down, and "in a dangerous condition;' and further, as is "stated in the record (fol. 26). Similar testimony was given on the part of the plaintiff below by the witness Kelsey under a like objection, ruling and exception (fol. 38, 39).

The statements of the brakeman were not within any duty or authority with which he was charged by the company, and could not affect the defendant. In fact, as it subsequently appeared, the statements were not true, and probably only expressed an opinion (fols. 51, 52, 35, 39, 42, 56).

The record shows this evidence was admitted under some supposed connection between the statements and the contract, but no such connection exists. The plaintiff below did not agree to see that the cattle kept their feet, nor did the defendant below agree to notify him if they were down. He was "riding free to take charge of the stock," and was under no such obligation to the company, and the company was under no such obligation to him. He was entirely at liberty to be governed by his own sense of what was prudent and safe in respect to avoiding personal injury, and acted upon his sole responsibility. The admission of the evidence implied that it was material, and was to be considered by the jury, and doubtless it largely influenced the verdict rendered.

2. "The counsel for the plaintiff below propos- "ed to prove by the plaintiff, as a witness, that at "the time he executed the contract, and received "the 'Pass' read in evidence, the witness did not "know that the defendant had established, or pre- "tended to charge, any higher rate for the trans- "portation of cattle from Buffalo to West Albany "than $70 per car load, to which evidence the "counsel for the defendant below objected as in-

"competent and immaterial; but the Court over "ruled the objection, and the counsel for the de- "fendant below then and there excepted to the de- "cision" (fol. 31).

"The witness then testified as below: I did not "know anything about any higher rate than $70 "a car load. When I went up to get my 'Pass' "they did not say anything to me about any high- "er rate" (fol. 31).

This evidence was in contradiction of the contract, which expresses that the cattle were carried at a rate reduced from the ordinary tariff rates, and tended to defeat it, and for that reason should not have been received.

3. The counsel for the plaintiff below at the trial proposed this question to the witness Herrick: Q. "Tell the Court and jury what you "know about the stalling on this road before this "accident now in question, how often it occurred?" "The question was objected to by the counsel for "the defendant below, as incompetent and imma- "terial. The objection was overruled by the "Court, and the counsel for the defendant below "excepted to the decision.' The witness answer- "ed, "I have known trains to stall there as they "call it frequently before the accident. I have "noticed it for the last twenty years—freight "trains; all kinds of freight trains, I should think, "I have seen stalled there,' with other testimony "to the like effect (fol. 62).

Some testimony of a similar character was given on a former trial, by witnesses not examined on this trial, but whose testimony on a former trial was read on this (fols. 47, 48, 56, 57). The question above objected to, and the testimony in answer to it under exception, were the first of the kind on an oral examination of witnesses on the last trial.

At the trial, the counsel for the plaintiff below proposed this question to the witness Redmond: "Q. Were you ever stalled on that embankment "on which Mr. Lockwood was injured?' 'The "counsel for the defendant below objected to the "question as incompetent and immaterial. The "question was overruled by the Court; defen- "dant's counsel excepted to the decision. A. I "could not say how many times, but I have been "stalled as much as ten times that I know of. I "have been stalled there since. I cannot tell how "many years that had been going on, or within "what time, or about what time. I can tell ever "since I have been shipping on the road; since "1852 I have been stalled there several times" "(fols. 80, 81 to 88).

This evidence had no tendency to prove negligence of the defendant below in respect to the accident in question. It introduced into the case foreign and irrelevant matter, calculated only to work mischief and prejudice to the defendant below. The previous stalling of trains may have occurred under circumstances relieving the company from imputations of negligence; without proving all the particular circumstances, the evidence could not be a safe guide, or entitled to any consideration; and the defendants could not be expected to be prepared to prove, or subjected to the burthen of proving, the particular circumstances of each case. So also the previous stalling may have been occasioned by negligence, and yet the stalling in question have been the merest accident, unaccompanied by negligence. In respect to previous stallings, the engines of the trains may have been of much less power than in the case of the stalling under consideration, which would necessarily preclude any just inference from previous stallings—even if negligent—that the stalling in question was caused by negligence. The theo-

ry of the evidence was, that the fact of previous stallings was, without more, circumstantial proof that the stalling in the present case resulted from the company's negligence, a proposition on the face of it obviously erroneous.

4. At the trial, the counsel for the plaintiff below "proposed to read from a report made by the "defendant below to the State Engineer, of the "number of accidents which happened on the New "York Central R. R. during the year 1858. It is "conceded by defendant's counsel, that the book "produced may be deemed sufficiently authenticat-"ed and be treated for the purpose of this trial as the "original report of the defendant to the State En-"gineer. The counsel for the defendant below ob-"jected to the same as incompetent and immate-"rial, and that statements therein contained of de-"fendant's officers, subsequent to the transactions "in question, are not evidence against the defen-"dant below. 'The Court overruled the objec-"tion, and the defendant's counsel then and there "excepted to the decision. The counsel for the "plaintiff below then read from said report the "following paragraph 'June 6. Charles Lockwood, "'while walking on the track at Canastota, at "'night, fell through an open culvert, sustaining "'some bruises by the fall'" (fol. 80).

This report was made by officers of the company, who knew nothing personally about the circumstances reported, and had no information about it except from their subordinates.

It is not any evidence of the facts stated to bind the company; it is only evidence that the report was made in compliance with the statute, and that the company had learned from its employees that the accidents specified in the report had occurred. This wat all that the statute contemplated. The Legislature could not have expected or supposed that the

officers making the report would have any personal knowledge in the matter, or more than information derived from the employees in charge of the train on the road.

While the report conforms to the statute, and answers the purpose of the statute has in view, it is obnoxious to the objections as evidence against the company, in an action like the present, that it is mere hearsay, and that it is only admissions of agents after the accident had taken place, of the fact of the accident and its character.

It is apparent from the case, that the real purpose of the counsel of the plaintiff below in introducing this evidence, was to present the defendant below to the jury as having treated the plaintiff below badly, by representing the injury as of a trivial and unimportant character (fol. 114), and the influence of it is seen in the large amount of the verdict rendered.

This error, even if it stood alone, should lead to a reversal of the judgment and a new trial, having doubtless largely swelled the award of damages.

V.

It is respectfully submitted that the judgment should be reversed for the errors alleged, and a new trial ordered.

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THERON R. STRONG,
Of Counsel.

Supreme Court

OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD CO.,

Plaintiffs in Error,

vs.

CHARLES C. LOCKWOOD,

Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

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AND

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AND

THERON R. STRONG,

Counsel for the Plaintiffs in Error.

NEW YORK:

EDGAR HOYT, LAW PRINTER, 58 JOHN STREET.

1873.

Supreme Court

OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiffs in Error,

vs.

CHARLES C. LOCKWOOD,
Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

This is an action to recover damages for an injury sustained by the defendant in error on the road of the plaintiffs in error, on the morning of the 6th of June, A. D. 1858, by reason of their negligence and misconduct and that of their employees, servants and agents.

The defendant in error was a cattle drover, and had been engaged in that occupation from early manhood. At the date of the disaster adverted to in the declaration he was on the verge of thirty-five years of age, enjoying perfect health, and uncommonly active and energetic in prosecuting his business. It was his sole avocation, and how competent he was to pursue it appears from the testimony of Judge Minor, folio 64 to folio 67.

On the morning of the 5th of June, A. D. 1858, he arrived at Buffalo with thirty head of fat cattle, which he had pur-

chased at Chicago and had brought on by rail. These he proposed to take to Albany over the defendant's road, and his wish being made known to its employees, they loaded them into two cars, which were placed in the first train that was to leave for Albany on that day. The train on being completed stood on a side track, and was ready about 11 o'clock in the forenoon to start for its destination.

At this juncture the defendant in error knew nothing as to the conditions or terms which the plaintiffs in error would exact of him in this regard. He was an entire stranger to cattle transportation over the road east from Buffalo. It is true he had formerly shipped a few car loads of cattle from Rome to Albany, but on what terms he could not recollect. Not a particle of testimony was adduced to show that this Company ever attempted to qualify their common law liability in connexion with their business from Rome, or, if they did, that the plaintiff below knew anything about it. He undoubtedly knew that he was to pay for transportation of his cattle from Buffalo to Albany seventy dollars per car load, or one hundred and forty dollars in all. He also knew that the plaintiff in error would exact from him some stipulation in the nature of an exhoneration from liability for his stock. In his testimony he says (fol. 32): "I understood before I got to Buffalo that I would there have to sign a release; I heard the drover talking about it." Again he says (fol. 79): "All I heard about the release was to release the Company from liability for the stock; I heard nothing about personal injury at all" * * * * "there was nothing said about my taking the responsibility for the sufficiency of the cars."

In this state of substantial ignorance, touching the terms which the plaintiffs in error were about to exact, he received from the freight master a memorandum specifying the numbers of the cars containing his cattle, and Mr. Kelsey, with whom he was particularly associated during the transit, a similar memorandum. They immediately started with all

possible speed for the freight office, distant about one fourth of a mile. The engine had already been attached to the train, or was about to be attached. The defendant in error testified that "there is a great object in having the cattle on their feet when the train starts; to have them all what we call on their legs." (fol. 78). For this reason Mr. Kelsey said to the defendant in error, "we shall have to be in a hurry," (fol. 77), and how they rushed up to the office, and how the papers were dashed at them and signed without any opportunity to ascertain their contents, and how they rushed back, sufficiently appears from the testimony of the defendant in error as set forth in the record from fol. 76 to fol. 79. He says: "They gave me the pass first; then they filled out the release, as they termed it, and told me to sign it; I did sign it; they showed it to me and asked me to sign it, and I hurried back as fast as I could go; I did not take it up and deliver it to them; I had no opportunity to read it" (fol. 77). The defendant in error repeated substantially the same thing on cross examination, and was not contradicted. The plaintiffs in error did not venture to call "E. Clark, Jr. Station Agent," for that purpose. As the case had already been once tried, to wit in October, 1866, it is no more than just to assume that the plaintiffs in error had on the last trial full knowledge and notice of what the defendant in error would say on this and other points in the case.

In Brooke *vs.* Pickwick, 4 Bing R., p. 218, Best, Chief J. says: "If coach proprietors" (here railway companies) "wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and, at the same time, to place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this they attract customers under the confidence inspired by the extensive liability which the common law imposes on common carriers, and their endeavor to elude that liability by some limitation which they have not been to the pains to make known to the individual

who trusted them." What annunciation was made in this case? What pains taken to make the contents of this paper known to the defendant in error?

In violation of the sensible and eminently just inculcations of Chief Justice Best, and under the aggravated circumstances hereinbefore detailed, the plaintiffs in error obtained the signature of the defendant in error to a paper which, it is insisted, constitutes an insuperable obstacle to any recovery in this case, and it is obvious that it would be equally so in any other action arising out of the same transaction.

Let us now turn our attention to this remarkable paper. It was no doubt intended to secure to the plaintiffs in error a complete immunity from responsibility for any and every species of negligence or misfeasance which they or their servants might commit in the prosecution of this cattle business. Let us examine some of its more important details:

I. It opens with an attempt to present something in the nature of a consideration for the stipulations into which the defendant in error was lured, and this was undoubtedly necessary. The plaintiffs in error were engaged as common carriers in the transportation of cattle, and were bound to receive and carry them as they were presented, subject to the common law liability. Hence, it occurred to them that if they were to take from a customer an exoneration from that liability there must be some consideration for it. If their general custom was to take from drovers some "higher rate" of fare—that is to say such an amount as would be justly renumerative, not only for the transportation of cattle, but also for assuming such liability—then, no doubt, it was competent for the plaintiffs in error to make an exceptional arrangement with the defendant in error, and to take from him an exoneration, therefrom, in consideration of their eliminating from the fare the charge for assuming it. Including such charge, would be the "higher rate;" excluding it, the lower. In fixing the amount for transportation many elements may properly be brought into view, such as the

capital originally invested in the road and its equipments; the cost of new equipments from time to time, and of repairs and improvements; the expense of operating the road generally, and of running catt e trains in particular, and reasonable profits and dividends for its stockholders. What would be a fair premium for guaranteeing the safe delivery of each car-load of stock (with the qualifications which the common law allows) could be readily ascertained by inquiring of those engaged in the insurance business. As thousands of car-loads are transported annually over our railroads from the West without any loss, the premium from Buffalo to West Albany must be small—probably five dollars per car-load would be an abundance.

Thus we see what the plaintiffs in error could do with propriety to supply a sufficient consideration for the engagements of the defendant in error. But what did they do in fact? Let the contract which they made out and induced the defendant in error to sign so ha-tily, answer as follows:

"That whereas the N. Y. Central Railroad Company transport cattle, horses, hogs, pigs, sheep, lambs, calves, or other live stock, *only* at first-class rates as per tariff, except in the following cases, viz.: where they transport them at a reduced rate in consideration that the owner or shipper assuming certain risks as specified below. Now in consideration that the said Railroad Company will transport for me such live stock at the reduced rate of seventy dollars per car load, the said C. Lockwood does hereby agree to take the risk," etc.

On this part of the agreement we submit the following remarks:

1. This language imports a declaration by the Company that at the date of the contract they ordinarily charged "first-class rates." What these rates were the contract does not tell us, but it refers to some "tariff" which the Company had previously adopted. It is said in substance that our usual course is to transport the

stock under responsibilities such as the law imposes, and for that we charge "first-class rates," that is to say, the rates specified in the tariff. The word "only," as used, is very significant. In connection with the exceptions specified it plainly implies that their usual charge was "first-class rates," and that the bulk of their business is done on that basis—but that there were some exceptional transactions where cattle were transported "at a reduced rate."

2. The introductory part (already quoted) is the language of the Company. It is the N. Y. Central R. R. Company who assert that they did this business in the manner and on the basis stated. No drover, and particularly such an one as the defendant in error, who appeared at the date of this contract for the first time at Buffalo with cattle, could be supposed to know anything on the subject. The counsel for the plaintiffs in error, therefore, did well to assume that they could not safely rely on the mere appearance of such representations in the contract, and that to render them available they must prove their truth or correctness. To this end the counsel introduced as a witness Soloman Drullard, the general freight agent of the Company, and utterly failed. Mr. D. could swear, and did (fol. 89) that this Company had a printed tariff of charges for the transporting of all sorts of property, including cattle, and that this tariff had been and was posted up in the freight houses along the road, which, on being produced, was identified by the witness. The counsel then read to the jury (fol. 89) the only part of the same that speaks of transporting cattle at "first-class rates," and this, as it turned out, related to the carriage of a single animal or several—less than a car load. A single horse, mule, or horned animal was to be estimated to weigh 2,000 lbs., and was to pay from Buffalo to Albany at and after he rate of seventy cents per hundred, two ani-

mals at 3,500 lbs., three at 5,000 lbs. and the residue less than a car load at their actual weight, all to pay at and after the same rate. Now each of the cars assigned to the defendant in error contained fifteen bullocks, and if we assume that every three of them would weigh in the aggregate 5,000 lbs. (and it is believed they were much heavier) then we must conclude that the "first-class rate" for transporting them to Albany would amount to no less than one hundred and seventy-five dollars per car load, or three hundred and fifty dollars for both car loads. Mr. Drullard himself swears in substance that they, in consideration of the exoneration, cut down the charge one half. He says (fol. 90) "this reduced rate is less than the tariff rates. The difference between the price when the drover goes along and takes care of his cattle was fifty per cent. at that time." By this he means that it was fifty per cent. less than what the Company charged for a single animal, or any number less than a car load. Dunbar, a witness for the plaintiff in error, swore (fol. 105) that he was the conductor of this train, and that it consisted of thirty-four cars and a coach. The compensation for running that train at seventy dollars per car load, amounted to no less than $2,380, but on the pretenses of the introductory part of this contract, as explained by Mr. Drullard, the charge would have been double that amount, or $4,760. Who can believe that any railroad company would make such an enormous deduction merely to exonerate themselves from the legal responsibilities appertaining to their business? Who can believe that this Company in particular could have charged "first-class rates" at all when they were running their trains in competition with the Erie Railroad, sometimes charging one figure per car load and sometimes another. Mr. Drullard, on cross-examination, testified (fol. 95) as follows: "On these bills (that were posted up in May and June, 1858) it was stated

that we would carry stock forward from Buffalo to West Albany at seventy dollars a car load."

Q. "Was anything said about any higher rate on these bills?"

A. "Yes, sir; that less than car loads we would charge 70 cents per 100 lbs.

Q. "I am inquiring about full car loads?"

A. "That was the price, $70 a car load. When we spoke of carrying full car loads" (meaning in the bills) "we said nothing about any higher rate than $70 per car load. That was the usual rate. We were competing with the Erie Railroad and always have been in competition with it. When they put down, we put down. They varied every two or three years before 1858. It has been higher and lower" (meaning than $70 per car load), "but I cannot confine myself to any particular date."

Nothing can be more apparent than that the provision in the tariff specifying the charge for transporting a single animal or any number of them less than a car load, had nothing whatever to do with the Western cattle trade. Mr. Drullard himself, at folio 92, explains the matter thus: "It is not customary to carry valuable animals at the same price you carry animals of ordinary value;" . . . . "we don't carry race-horses valued at $20,000 at the same price we carry a $100 horse." Was it ingenuous in the opposite counsel to attempt to wrest this provision in the tariff from its true application, so as to make it embrace the vast herds of fat cattle being incessantly transported from the West to supply the Eastern markets?

II. Having thus ascertained the true character of the introductory part of this contract we are now prepared to enter into its subsequent details, and may well anticipate that the latter will prove not less remarkable than is the former. What are these details?

1. The plaintiffs in error stipulate for a complete immunity from liability for losses occasioned by delays, however causeless or even outrageous they should be. This liability seems to have been a subject of peculiar solicitude to the plaintiffs in error, for they advert to it twice in this contract, and take from the defendant in error a twofold exoneration therefrom. When we consider how important it is that a cattle train should be carried forward as speedily as possible to its destination; how much the poor creatures must suffer when pent up in the cars and there kept standing for many hours without food or water; how certain they are to lie down if there be delays in the transit, and thus to be trampled and injured, and how an important part of public sustenance will thus become vitiated, and how probable it is that any railroad company could, under the protection of such a stipulation, become lax and heedless in respect to exped ting these trains; it is believed that a clause so contrary in its tendency to humanity and the public welfare cannot fail to be regarded with disfavor by this Honorable Court.

2. But the next immunity is far more exceptionable. The defendant in error was to assume the whole responsibility of the adequacy or safety of the floors and doors of the cars containing his stock, "Previous to loading," (says the contract) "the owners are required to examine the cars, and to take all risks against accidents that may happen, in consequence of insecurity (if any there may be) in the floors or the doors of the cars," (fol. 12.) This would, of course, include an appreciation of the adequacy of the frame work of both the one and the other. How could any drover form a safe judgment on such matters? He is no adept in examining the rolling stock of a cattle-train. Besides the floor of a car thus employed, is uniformly (after the first trip) covered all over with filth. With what sharpness of vision could

he penetrate such a covering, and ascertain the condition of the floor below? Besides, it appears from the evidence, that the stock in this case—as it is in every other—was rapidly loaded, and the train hurriedly formed, and there was not, and never can be, any fair opportunity to make the examination suggested. And finally, no notice whatever was given to the defendant in error that he was to assume any such responsibility. This was not pretended on the trial below. The plaintiff in error did not call the shipping master to show that he gave any such notice. The defendant in error had only been told on the way from Chicago that he would be required at Buffalo to sign some paper or instrument in the nature of a release; that it would be a release of the Company from all liability for injury to the stock (fol. 79.) "There was nothing said," he adds, "about my taking the responsibility for the sufficiency of the cars."

The introduction of such a clause into this contract, abundantly illustrates the disingenuousness and unfairness of this transaction.

3. We now come to the next immunity, which is as follows: "and it is further agreed that the said C. Lockwood is to load, trans-ship and unload said stock at his own risk—the said New York Central Railroad Company furnishing the necessary laborers to assist." Here we find another duplex provision against responsibility for injuries or losses that might be sustained in a critical part of the business—first, it is explicitly said that the loading, trans-shipping and unloading the stock should be at the risk of the owner; and, secondly, that in such operation the owner was to be the principal—he was to load, trans-ship and unload his own stock—the Railroad Company were not to act as his agents, but only to furnish the necessary laborers "to assist." It is not even said that they were to supply the necessary facilities for getting the cattle from the ground into the

cars, such as every railroad company engaged in this business keep on hand, but poor Mr. Lockwood was in this regard to help himself as he could with nothing but laborers to assist. It is not pretended that he knew anything about this when his stock was loaded. He testified on the trial below, on cross-examination, as follows, fol. 77. "I told the man who had charge of loading the cars, which were my cattle, I did not help load them, but saw them loaded." The shipping master, at Buffalo, did not appear as a witness against the defendant in error on this point, so that, no doubt, he (the defendant) was wholly ignorant of an intention to introduce any such clause into his contract. The symmetry in point of moral principle between this and the next preceding clause is quite remarkable, and must attract attention.

4. The next immunity to be noticed requires Mr. L., to take the risk of the loss of or injury to his stock during the transit, and exonerates the plaintiff in error from exercising any care or vigilance in the premises. Suppose that in consequence of the insufficiency of the doors, or of the frame work of any car, the cattle were to escape, who is to pursue and capture them? Not the Company, for they were not to be liable for escapes at all. Suppose that the agent of the Railway Company, during a "heated term" should crowd too many cattle into a car, and in consequence all or some of them are suffocated, or their value impaired, who is to sustain the loss? Not the Company, for suffocation and even fire are to be at the risk of Mr. L. Suppose that the sufferings of the poor brutes from such cause are enormously aggravated by unnecessary delays in the transit, and the cattle are injured in a corresponding degree? The Company has now two clauses under which to take refuge—the "delay" clause and the "suffocation" clause, and will claim irresponsibility, of course. Suppose, finally,

that in consequence of unnecessary delays in the transit, some of the cattle become excessively weary, and lie down in the cars and are trampled on and injured when the fact would have been otherwise, had the Company properly done their duty, are they to take refuge in this case also, under two clauses--the "maiming" clause and the "delay" clause to be acquitted of all liability? Such stipulations are adapted to encourage brutality in the treatment of dumb animals; are *contra bonus mores* and should be declared void. "A merciful man," it is said, "is merciful to his beast." We shall have few exhibitions of the spirit commended by this maxim in the vast cattle trade of this country, if stipulations like these are to be sustained.

5. We now come to the consummation of this whole business of exonerating the plaintiffs in error from their proper responsibilities in the last stipulation of this contract, which is conceived in the following words, "the persons riding free to take charge of the stock, do so at their own risk of personal injury, from whatever cause," or in other words, that they (the plaintiffs in error) might, by any recklessness, whether committed themselves or by their servants and agents, maim, lacerate or even kill the defendant in error with impunity.

This case was first tried at the October term of the Circuit Court of the U. S., for the Southern District of N. Y., in A. D. 1866, by the Hon. David A. Smalley, United States Judge for the District of Vermont, holding the court on the requisition of Mr. Justice Nelson, and the result was a verdict for the plaintiff below, for twenty-five thousand dollars damages. On the trial, substantially the same facts were proved, and questions of law made, which are disclosed by the bill of exceptions, now under consideration. The defendants below, on the rendition of the verdict, had a case made and allowed for a revision before a full bench, of the

questions decided by Judge Smalley, among which, by far the most important was, whether the very remarkable clause which appears at the close of the contract of the 5th of June, does or does not constitute an impediment or bar to a recovery by the plaintiffs below. It appears from the record or case now produced, (in print) that on the rendition of that verdict, the defendants below made no motion to set the same aside on the ground that the damages were excessive, but everything was stated necessary to bring under revision all questions of law properly arising in the case, and decided by the learned judge. To this end we are informed that the counsel of the defendants "requested the Court to instruct the jury that by the terms of the contract between the plaintiff and defendants, under which the plaintiff and his cattle were carried, the plaintiff assumed the risk of the injuries of which he complains, and, therefore, the verdict should be for the defendants." The court refused such instruction, and decided that the contract between the plaintiff and defendants is void, as being against the policy of the law.

The court also decided that even admitting that the contract was valid, yet that it should be construed strictly, and as the plaintiff was not injured when on the train, the case does not come within the terms of the contract, and the plaintiff is entitled to recover notwithstanding the contract.

The learned judge in his charge to the jury, after adverting to the claim of the defendants of exemption from all liability in this case, under and by virtue of the contract, proceeded as follows: "This claim, gentlemen, the court will dispose of as a question of law. The court has already decided that it was a contract between the defendants and plaintiff, under which the plaintiff is entitled to the usual remedy for injuries sustained by him, through the negligence of the defendants, and the jury will take the decision of the court upon this point for the purposes of this trial. The court has decided that a contract, such as the defendants claim this was, is contrary to public policy; that a contract between a large cor-

poration, whose road is operated by steam, and a passenger by which the Company endeavors to absolve themselves from their obligation to transport the passenger with due care and skill is contrary to public policy, not to be sustained by law, and therefore void. This claim of the defendants, therefore, constitutes no defence of action."

To the rulings of the learned judge, and to his charge as above specified, the defendants below excepted.

The revision of these and other questions before a full bench, was, owing to circumstances beyond the control of counsel, delayed till late in the summer of 1868, when they were fully heard by the learned judges at Windsor, Vermont, and thereupon they came to conclusions satisfactory to themselves, and Judge Smalley, was (as is understood) assigned to write an opinion and annunciate the result. Unfortunately, he was soon after taken sick, and this occasioned a delay of another year. Ultimately, Mr. Justice Nelson promulged the conclusions to which he and Judge Smalley had come, in the following concise form :

"Before Mr. Justice Nelson and Judge Smalley.

Charles C. Lockwood,

vs.

The New York Central Railroad Company.

The plaintiff in this case was accompanying some cattle belonging to him, during their transit over the Central Railroad from Buffalo to Albany. Near the town of Lenox, on the line of said road, is a high embankment passing over a deep chasm and forming a steep ascending grade. The engine attached to the train upon which the plaintiff was, being deficient in power, the attempt was made to

ascend the grade by backing down and starting again with great force, by which some of the cattle were thrown down and their safety endangered. The plaintiff thereupon got out of the car in which he was riding, and while walking forward to look after his cattle, fell into the chasm, which was not guarded by any light or railing. For the injury so sustained, the plaintiff sued the Company and recovered $25,000. The present application is on the part of the Company for a new trial on the ground of excessive damages.

"NELSON, C. J.:

After the best consideration we have been able to give the case, we have come to the conclusion that the damages are excessive, and that the case should be submitted to another jury. But, as we do not find any substantial error in point of law committed by the learned judge in course of the trial, the new trial must be on payment of the costs of the circuit. Let a rule be entered accordingly."

It was so entered at the October term of the court of 1869, and the defendants below having filed the bill of costs the rule became absolute.

The case was brought to trial a second time, at the April term of the court of 1870, before the Hon. Lewis B. Woodruff, Circuit Judge, who having heard the case as set out in the bill of exceptions, charged the jury in conformity with the opinion of Mr. Justice Nelson, and his associate, Judge Smalley, that the agreement produced on the trial and the pass, both of which are set out in the declaration herein, are no impediment to a recovery by the plaintiff for the injury to his person; if they (the jury) found in his favor under other instructions not material to be repeated here. To this part of the charge, and to other rulings to the same effect, the counsel of the defendants below excepted, and now propose a revision of the same under this writ of error.

On the case thus presented two questions arise: 1st. Does it come either literally or substantially within the words con-

tained in the papers made and delivered on the 5th of July, 1858, from which the plaintiff in error endeavors to deduce a stipulation of complete irresponsibility for the injuries received by the defendant in error, as proved on the trial below; and 2d. If such a stipulation is properly deduced from those words, will this court recognize it as valid and carry it into full effect? Is it competent for a common carrier of persons, and particularly for a railroad company, to exact from a passenger an agreement that he will not hold them responsible for any injury which he may receive during the transit, by reason of any negligence which they or their servants may commit, however gross the same may be?

I. We insist that the case is neither within the words of the memorandum of the 5th of June, 1858, (fol. 12) nor within those of the stockdrovers' pass, (fol. 13) nor is it material whether those words be taken separately or together, nor how they are construed, whether strictly or otherwise.

(1). Let us examine that clause of the former, on which the plaintiffs in error rely, by itself, and consider what it imports. It is as follows, viz.: "And it is further agreed between the parties hereto that *the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause.*"

(*a.*) And here we remark that this clause can hardly be held to include the defendant in error himself. In substance he speaks thus: "I agree that the persons riding free to take charge of the stock, do so at their own risk," &c., or in other words, "I may have occasion to send servants on the train for the purpose indicated, and, if I do so, you (the Company) shall, as to them, be irresponsible as expressed."

If he intended to include himself at all, it was himself only. Why did he not speak out explicitly? Why use the awkward, roundabout expression, "the

persons riding free to take charge." Why the third person plural when the first person singular was intended? But perhaps, in view of the manner in which the signature of the defendant in error was obtained to this paper, and all the circumstances attending that transaction as disclosed by the record, it can not be assumed that he speaks at all by its contents. It was shown on the trial, that the plaintiffs in error, by their station agent at Buffalo, prepared and presented the same to the defendant in error for his signature, and that he was so situated that he was obliged to sign instanter, that he had no chance to even read the paper, much less to possess himself adequately of its contents. This was well known to the station agent —there was nothing peculiar in Mr. Lockwood's case —it was their ordinary way of doing business. We have then to do with words which are nominally those of the defendant in error, but in fact are the words of the plaintiffs in error—words which they themselves selected and put into this paper and imposed on the defendant in error. It is then these plaintiffs in error who have the responsibility of having concocted and induced the defendant in error to sign a stipulation without knowing what he signed, which is wholly inappropriate, and should this Court, for that reason, deem the same unavailable as a defence (as we conceive it to be) the result will constitute a fit retribution for the disingenuousness which characterized this transaction.

(b.) But if we are wrong on this point, we next insist that the words of this clause do not include any such case as that now before the Court. No injury can be held to be covered by it, except such as was in a strict sense incurred while the defendant in error was on the train, "riding, in charge of his stock." The introduction of the word "free" into this clause

does not vary the rights of the one party nor the obligations of the other one hair. We will not go so far as to say that the train must have been in motion at the instant the injury was received, but we insist that the party must, when the disaster happened, have been "riding," that is to say, on the train about to start or proceeding to its destination, usually moving, but occasionally stopping, subject to the well known incidents and exigencies of the business. It is difficult to see how it can be said that the defendant, when injured, was "riding," as he was not on the train, and the train itself was not in motion. It would seem to us that no railroad company that has overloaded any of its trains, and caused it to be effectually stalled, can rightfully say that anybody on the train, or rather on the road, near it (for a legitimate purpose) was at the time riding.

2. Next, we will examine the "stock drover's pass" in connection with the memorandum of agreement, and then the case will be more than clear, it will become vivid. What is that pass? After stating that the defendant in error had shipped the quantity of stock which entitled him to pass free to West Albany, it proceeds as follows, "the conductor of the train on which this stock is carried will thereupon pass the bearer, at his own risk, to West Albany, taking up this pass upon arriving at the place of destination. *The acceptance of this pass is to be considered a waiver of all claims against this Railroad Company for personal damages and injuries received when on the above train.*"

That we are entitled to group these papers together, that is to say, the "agreement" and "pass," in giving a construction to either, or both, appears from the opinion of Selden Ch. J., in Perkins vs. The New York Central Railroad Company (24 N. Y. Rep. p. 196), and in

Bissell vs. the Same Company (25 N. Y., 442), which opinions are cited against us by the counsel opposite. In the Perkins case (at p. 208, vol. 24,) the Chief Justice remarked as follows: "as, however, the delivery of the ticket was simultaneous with the execution of the agreement, and both related to the same transaction, either may be referred to, to aid in interpreting the other, and in the Bissell case (at p. 446, vol. 25,) the same Judge recurs to this subject again, and says: "in regard to the first question I I think he (Bissell) must be regarded as traveling by virtue as well of the ticket as of the contract. They were both delivered at one time and together constitute the contract. Each may be referred to in arriving at the terms of the whole contract, which was in effect but one and not two." If "the memorandum" is to be deemed equivocal (as we submit it should not be), we insist it is made explicit by the "pass," and that the plaintiffs in error, in seeking an exoneration from their proper responsibilities, are limited in express terms to such "personal damages and injuries" as the defendant in error should receive "when on the above train," that is to say, on the train that was about to carry him and his cattle forward to West Albany. The word "*when*," as used in this clause, has a peculiar force. The plaintiffs in error say in effect to the defendant in error "we do not ask to be protected and saved harmless from any or every damage or injury which you may possibly sustain during that journey. As about all the claims against us arise out of collisions, fractures of rails, explosions, defective engines and cars, incompetency or negligence of conductors, engineers, brakemen, and other servants of the Company, and these ever occur *when* the train is in motion, all we ask of you is to say that you will make no claim for damages except for such as you shall sustain '*when*' on the train." With that we will be content. We ask nothing more. To include

within this stipulation such an *outre occurrence* as this would be to wrest the words which the parties saw fit to use from the only meaning of which they aresusceptible, and to make for them a totally different contract from the one which they made in fact.

3. We submit that were we to accord to the plaintiffs in error the privilege of giving to the words a liberal construction in their favor, they could not be made to include this case. But they are entitled to no such privilege. No rule of law is better settled than that a stipulation or agreement obtained by a common carrier in derogation of his common law responsibilities is to be rigidly construed. It must express the intent in such a full and precise manner as to make its application inevitable. Mere loose phrases and indefinite expressions, however general, will not do, but the agreement must so far enter into particulars as to render it certain that the parties intended to include the case under consideration, or rather the class of cases to which it belongs.

The case (decided by this Court) of the New Jersey Steam Navigation Company, Respondents, against the Merchants' Bank, Libellants, (6 How., U. S. Rep., p. 344), is proof conclusive of the soundness of this view of the law.

It appeared on the trial of that case that one Harnden (under whom the libellants claimed) was at the time the disaster occurred, which gave occasion to the litigation, engaged in the express business between New York and Boston, and that prior to the 13th of January, A. D. 1840, he had made a contract with the respondents for the transportation on their line of steamers, running between New York and Stonington, of a crate, to be used for the reception of such valuables as he might in the prosecution of said business see fit to deposit therein, and that on that day he (H.) deposited in his crate on the Lexington, (one of the

steamers belonging to that line) $18,000 in specie, to be carried forward to Stonington, and that this steamer left the port of New York at about 4 o'clock of the same day, and, proceeding to its destination, caught fire a few hours thereafter, and was totally destroyed and lost with all the freight on board, including Mr. Harnden's crate and its contents.

How this fire originated, and its cause, is explained by Mr. Justice Nelson in giving the opinion af the Court (Ib. 384) thus: "There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and alongside of the boiler deck, and around the steam chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton round the chimney extended from the boiler within a foot of the upper deck." The judge says the fire originated in this cotton near the boiler, as it did undoubtedly, and the question decided was whether the respondents were or were not responsible for the loss of this specie. This turned on the construction to be given to provisions inserted in the contract with Harnden, (no doubt with a view to secure the irresponsibility of the respondents), the substance of which is stated by Judge N. (Ib. 389) thus:

1. "The crate and its contents to be at all times exclusively at the risk of said Harnden, and the respondents not in any whit to be responsible either to him or his employers for the loss of any goods, wares, merchandise or moneys to be conveyed or transported by him in said crate, or, otherwise, in the boats of said Company."

2. "That he should annex to his advertisements, published in the public prints, the following notice, and which was also to be annexed to his receipts of goods or bills of lading:"

"Take notice—Wm. F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care, nor is any risk assumed by, nor can any be attached to the proprietors of the steamboats in which his crate is or may be transported in respect to it or its contents at any time."

In the discussion of the question thus arising, the learned judge remarked as follows:

"The burthen of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend on implication or inference founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties." (Ib. 583.)

"The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement to regard it as stipulating for wilful misconduct, or gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipment and furniture, or in her management by the master or hands." (Ib.)

"This was the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailm. § 570). Nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation." (13 Wend. Rep., 611, 627, 628.) (Ib.)

"Although he was allowed to exempt himself from losses arising out of events and accidents, against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods, and in their delivery, and manner of conveyance for their transportation." (Ib.)

"This rule should, we think, govern the construction of the agreement in question." (Ib.)

"If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants and agents in the transportation of the goods, it should be required to be done at least in terms that should leave no doubt as to the meaning of the parties." (Ib., 384.)

In these views the whole Court, with one exception, concurred, and a stipulation conceived in broad and general terms, like that now under consideration, was held to be no defense for the carrier.

We conclude this branch of the argument with remarking (1) that according to Mr. Justice Nelson no generality of expression, however positive it may be, can be adequate to exclude the doubt adverted to by him. (2) The plaintiffs in error cannot say, as did the Judge, in one of the above paragraphs, that "the language" (of this stipulation) "is general and broad, and might well comprehend every description of risk incident" to the business, for by it every risk and description of risk is excluded, except such as the defendant in error, should incur *when on the train*. (3) Every contract obtained by a common carrier, whether of persons or chattels, in derogation of his common law re-

sponsibilities, is to be construed strictly, and what that is let the expositions of Mr. Justice Nelson and the adjudication of this Court in the Harnden case speak, and (4) the opposite counsel will hardly venture to suggest that there is a distinction between the carriage of persons and the carriage of chattels, and that as to the former, common carriers and especially railroad companies, should enjoy peculiar prerogatives and privileges, and be relieved from the embarrassments resulting from construing strictly such contracts as they may be pleased to exact from passengers, with a view to secure to themselves impunity in occasionally killing some of them and smashing the limbs of others through negligence. Surely the life of a man in this business of legal construction is to be as highly appreciated as that of a beast, and the law will hold a carrier of the former to as high responsibilities as it will a carrier of the latter.

The conclusion of the whole matter is that the case of the plaintiffs in error is neither within the words of this stipulation, nor within its true intent and meaning, and must fail on both grounds.

II. We now come to the consideration of a question of great interest in point of principle, and of no small importance in its bearing on the welfare of society, and particularly on that of the traveling public; and that is, whether it is competent for a railroad company to exact from a passenger an agreement that he will not hold them responsible for any injury to his person, which he may sustain by reason of the negligence of themselves, or their servants and agents.

And here we observe that it appears from the pass, which was given to the defendant in error, on the 5th of June, 1858, that he was a paying passenger on this cattle train. It opens, thus: "I certify, that the bearer, C. Lockwood, has shipped, on behalf of himself, the

quantity of stock which *entitles* him to pass free to W. Albany," which is the same thing as to say that the amount which he paid, or wants to pay, to wit: $70 per car load or $140 in all, was to be deemed compensation for the transportation, not only of his cattle, but of himself. Besides, during the transit, he was to take charge of his stock and to perform duties which would otherwise devolve exclusively on the plaintiffs in error, or on their servants and agents; so that the defendant in error was a paying passenger in a double sense, and a full paying passenger too. If there is any distinction between a paying and a gratuitous passenger in this regard, (and this we do not admit), then the fact adverted to must inure to the benefit of the defendant in error. It is apparent, that in order to maintain the validity of the last clause of the agreement before us, the opposite counsel must insist that it is in the power of the railroad companies to make requisitions on the traveling public for this species of irresponsibility to an indefinite extent, and that in this respect the paying passenger is no better off than a gratuitous one.

The question, to which we have adverted, was presented for adjudication to the Court of Appeals, of the State of New York, in 1862, in the following cases, to wit:

Wells *v.* The N. Y. Central R. R. Co., 24, N. Y. Rep., 181.
Perkins Admx. *v.* the same, ib. 196.
Smith Admr. of Ward *v.* the same, ib. 222.
Bissells Admx. *v* the same, 25, ib. 442.

The two first cases, to wit, the Wells case and the Perkins case, are those of strictly gratuitous passengers on ordinary passenger trains, and the two last, the (Ward and the Biscell cases) are those of passengers carried in

a car attached to a cattle train, and holding a stock-drover's pass. The court at that time consisted of Selden, Ch. J., and Denio, Davies and Wright, justices, whose terms of office was eight years, and Sutherland, Gould, Allen and Smith, justices, whose terms was only one. In the two first of these cases, a majority of the court, to wit, Selden, Ch. J., Denio, Davies, Gould, Allen and Smith, held the exoneration was a good defense, inasmuch as the party injured was a gratuitous passenger, but Sutherland gave a dissenting opinion, in which Wright concurs. This opinion is favorably noticed by Read, J., in The Pa. Railroad Co. *v.* Hendersen, in 51 Pa. Rep., p. 326, where he says: "Sutherland, J., dissented, and his opinion, in which Judge Wright agreed, is certainly better reasoned than the opinion of the majority." In the Ward case a majority of the court, to wit, Wright, Denio, Davies, Smith and Sutherland, justices, held the stipulation no defense, (Selden, Ch. J., and Gould and Allen dissenting), and in the Bissell case a majority, to wit, Selden, Ch. J., and Gould, Smith, Davies and Allen, justices, held it to be a good and sufficient defense, (Denio, Wright, and Sutherland dissenting), and yet these cases were both pending in the Court of Appeals at the same time, and were both argued before either was decided. This appears from the fact that there is published in the Perkins case, (24, N. Y. Rep., 208), a long opinion by Ch. J. Selden, which, the reporter tells us, was given by him in some other case, but in what case he does not inform us. But, on examining that opinion, we find it was given in the Bissell case (24 N. Y. Rep. 214) which the Ch. J., in substance admits. Not differing essentially from each other, these two cases, both having been argued, were taken up in succession, the Ward case at the March term, 1862, and the Bissell case at the December term of the same year, and one was decided

one way, and the other, the other, and all that is gained to the cause of sound jurisprudence is to be found in the opinion of Wright, J., in the Ward case, (24, N. Y. Rep., 223), which Mr. Justice Read, of the Supreme Court of Pennsylvania, says, (51 Pa. Rep., 372) "is valuable for its sound reasoning against the validity of such restrictions imposed by passenger carriers." In neither the Ward case nor in the Bissell case did it explicitly appear, as it does in this, that the drover was a paying passenger, and yet such was the inference which the judges drew (as we think properly) from the nature of the transaction. It is believed that the plaintiffs in error will not, by a reference to these New York cases, make the slightest advance toward the acquisition of what they would no doubt deem an invaluable boon, to wit, the power to secure, by contract, irresponsibility for personal injuries occasioned by negligence.

The defense set up in this case was, for the first time in either of the two countries where the common law prevails, presented at Albany at the date specified. All books of reports, both English and American, are silent on the subject until we get down to the 24th N. Y. Reports. How can we account for this? Readily! It is because litigation springs out of actual transactions, and there having been no such contracts, there could be no law suits, no adjudication. We affirm that no proprietors of any stage coach line, when the passenger carrying business by land was almost exclusively in their hands (as it was for centuries), ever sought to exonerate themselves by contract from the obligation to use all proper care and diligence for the safety of a passenger in life and limb. It is true, that towards the close of the last century, they undertook, for the first time, to secure a modification and even an annulment of the obligation, which they were under at common law, to carry the baggage of a passenger safely—if they

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wished to modify they would give notice that they would be liable for baggage only to a specified amount, except on certain conditions—and if to annul they would simply say, "baggage at the risk of the owner," but they never dared to add (as the N. Y. Central R. R. Company do in this contract) the owner at his own risk! Not a few cases thus arising are to be found in the English and American reports, and among them is the case of Hollister *v.* Nowlen, (19 Wend. Rep. p. 234) wherein may be found an opinion by Mr. Justice Bronson that does honor to the American judiciary. We affirm that no canal boat company (engaged in this department of business), and no railroad company ever attempted to secure such an exoneration until the plaintiffs in error made the adventurous experiment a few years since. Although they have been followed by most if not all of the railroad companies of this country, yet they have not by the English companies in a single instance. They are just as largely engaged in the cattle transportation business as our companies are, and there as here the owner or an agent of his has a free ticket and accompanies the cattle on the train to supervise and take care of them. This fact is adverted to by Read, J., in Pennsylvania R. R. Co. *v.* Henderson, 51 Pa. Rep., p. 324. With respect to the safety of beasts the railroad companies in both countries unite in saying, "we are not to be responsible," (with what success we shall see heareafter), but when we come to the safety of their owner, the English companies are silent, and it was reserved for the intrepidity of these plaintiffs in error to put the beasts and their owners on the same footing, and to say the same thing *as to both*.

Hence, the learned judges who sustained the defense in the cases named, were obliged to have recourse to chattel cases (of which there are many) for such principles and analogies as tended in their judgment to sus-

tain the result to which they came. Thus, Ch. J. Selden, in an opinion which, under peculiar circumstances, appears in the case of Perkins Admx. *v.* The Plaintiffs in Error, (24 N. Y. Rep., p. 209), says that "although the responsibility of carriers of passengers differs essentially from that of common carriers of goods, the latter being substantially insured against every loss not arising from inevitable accident, while the former are only liable for injuries resulting from negligence; there is, nevertheless, a strong resemblance between the two kinds of employment, and some light may be obtained in cases like the present," (meaning for the disposition of such cases) "from the decisions in regard to the carriers of goods." Now while we do not admit that the two classes of cases are strictly analogous, yet we fully concur with the chief justice in saying that there is a strong resemblance between the two employments, and we add, moreover, that in our opinion not only "some light" but a vast flood of it may be obtained from such an examination, enabling us to see with certainty what disposition of the passenger cases would be most conformable to law. As it is made by the argument of Ch. J. Selden perfectly legitimate for us to take up these chattel cases, and to inquire into the state of the law on this subject, both in England and this country, we will proceed to do so, and we are willing it should be understood that we enter on that inquiry with some alacrity, both because we are satisfied it will aid essentially the solution of the principal question before us, but because it will show, as we think, that the cattle stipulations contained in the contract of the 5th of June will not bear the test of judicial scrutiny, and the judgment of this court on that matter will, we conceive, be promotive of great public interests.

To both of these ends we submit the following remarks:

It has been immemorially held that common carriers are

responsible for the safe delivery of goods entrusted to them, and are liable for any and every injury or loss not occasioned by an act of God or a public enemy. They are so for loss by robbery or fire, or any other cause emanating from human agency (other than that of a public enemy) however vigilant or blameless they may be. This stringent rule of the common law was adopted and rigidly adhered to for many centuries, on considerations of public policy. In Coggs vs. Barnard, 2 Ld. Raymond 918, Holt, C. J., calls it "a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons that they may be safe in their ways of dealing." In Forward vs. Pittard (1 T. R. 27) Lord Mansfield says that the object of the rule was "to prevent litigation, collusion and the necessity of going into circumstances impossible to be unraveled." The common carrier is held to be an insurer, and is entitled to charge a fair equivalent, not only for his trouble and expense, but also for the risk he runs. He exercises a public employment and has public duties to discharge. The obligation to perform these duties under the high responsibilities already named, does not arise under contract, but is imposed by law." "The rules of the common law" in this regard, as is justly remarked by Bronson, J., in Hollister vs. Nowlen, 19 Wend. R. 238. "Are simple, well defined, and what is no less important, well understood." The idea that a common carrier could, by any act of his own, set aside this responsibility or modify it in any degree, seems not to have been entertained in England for centuries. Indeed, directly the reverse was held, as can be shown by ample authority (vide Doct. vs. Student Dial, 2 Ch. 38, p. 224, and Noyes' Maxims 92, quoted by Cowan, J., in Cole vs. Goodwin, 19 Wend. R., p. 261.

It appears, however, that about the close of our Revolutionary war, common carriers, in England, undertook for the first time to relieve themselves from this responsibility, by

giving notice either that they would not be liable at all in certain contingencies, or liable only to a specified extent. Unfortunately (as it now appears) these efforts were regarded with favor by the courts, and it was held in numerous cases that the carrier might make a special acceptance limiting, if not abrogating his common law responsibility. If the owner after the terms dictated by the carrier had been made known to him, suffered the goods to pass into his hands, it was deemed adequate proof of assent to the terms thus dictated, and to modify the rights of the one party and the obligations of the other accordingly. Even a general notice sufficiently promulgated, it was held, might be proved and submitted to a jury as evidence of such a modification. The most extensive consequences of evil resulted from this relaxation of the common law rule, which are vividly depicted by Bronson, J., in the case already quoted. Very soon after the English courts commenced tolerating these innovations, the judges detected their mischievous tendency, and expressed regrets that they should ever have sanctioned any departure from the strict rule adverted to. In Down vs. Froment, 4 Campb., p. 40, Lord Ellenborough, after expressing his sorrow that carriers had been allowed to limit their common law responsibility at all, adds, that some legislative measure upon the subject would soon become necessary. This anticipation of Lord Ellenborough was realized by Parliament in 1830, in passing the act of II, George IV., and I, William IV., Ch. 68, usually denominated "the Carriers' Act." It relates solely to the carriage of goods and other personal effects, by land, in mail stages, coaches, wagons, vans and other public conveyances for hire. The first section enumerates certain articles of great value, and usually of small bulk, and provides that the carrier shall not be liable in respect to such articles, unless their value, when exceeding £10, and their nature are declared and made known to him at the delivery thereof, and the second authorizes the carrier to demand an increased rate for such articles, in conformity to a notice

duly posted in his office—the third requires the carrier, on the reception of the increased rate, to give a receipt therefor, with a clause insuring the safe delivery of the goods—the fourth abrogates the effect theretofore given to public notices, and provides that the carrier shall, notwithstanding such notice, remain liable as at common law—the fifth is not material—the sixth is as follows, "Provided always, and be it further enacted that nothing in this act contained shall extend or be construed to annul, or in anywise affect any special contract between such mail contractor, stage, coach proprietor or common carrier, and any other parties for the conveyance of goods and merchandises." The seventh section is not material—the eighth provides in substance, that the common carrier shall remain liable for any loss or damage occasioned by the felonious act of any servant of his, and such servant shall be liable for any loss or damage arising out of his own neglect or misconduct. The ninth, tenth and eleventh sections are not material.

In Hollister *vs.* Nowlen, Bronson J. says "the only modification of the common law rule, in relation to carriers, made by this statute, is that which requires the owner, without a special request, to disclose the nature and value of the package when it contains articles of a particular description. The premium for care and risk the carrier might have required before" (meaning before the act was passed). "In relation to all articles not enumerated, and in relation to those also—if the owner comply with the requirements of the act—the carrier is declared liable as an insurer, and must answer as *at the common law*. The whole doctrine which had sprung up under notices is cut up by the roots and in such language as renders it apparent that the legislature deemed it an innovation of the law of the land."

At the date of the Carriers' Act the whole business of common carriers in transporting not only passengers but chattels by land, was carried on by the agency of horse

power and on wheeled vehicles. Parliament seem not to have had the slightest idea of the wonderful revolution so soon to be effected by the introduction of steam power, otherwise they would have enumerated in that act railroad cars with "mail stages, coaches, wagons and vans" as being employed and about to be employed in the business. But, nevertheless, steam power was soon introduced, and ere long brought into full activity not only in England but in this country, and the effect was to supercede in a great degree horse power, and to make that of steam paramount, or, in other words, to take out of the hands of private parties using the old agencies nearly the whole of the chattel carrying business, (with that of the passenger business), and to confer it on railroad companies. These concerns are uniformly owned by corporate bodies which are under the control of shrewd, eagle-eyed men, often not over scrupulous and having a solicitude for the success of their enterprises respectively in an inverse proportion to their regard for the public welfare. Nothing could be more natural than that in Great Britain these adroit managers should turn their attention to the Carrier Act with a view to see whether they could not in some way under its provisions, obtain shelter from the proper responsibilities of their vocation. It did not take them long to conceive the idea of realizing their object under and by virtue of the provisions of its Sixth Section. If the effect should be to annul other parts of the act and to defeat its policy they perhaps did not consider, or, if otherwise, they did not care. They knew that they had such a complete control of the business they could exact from the owner of property to be carried any terms which they might be pleased to dictate. Having a monopoly their power was irresistible. If a person in England came with a lot of cattle to a rural depot (as in this case to Buffalo) to be forwarded to London, (as here to West Albany for the New York market), how could he resist any requisition made by the railway company or its agents for terms or concessions in their favor? The

cattle must go forward, any how; delay for even one day would be highly injurious, perhaps ruinous. The owner of this, and, in fact, of every other species of property, is an isolated individual and utterly defenceless. He is dealing with a powerful body of men supported by millions of capital; men who are unseen, who appear by agents only, and to whom he can address no remonstrances, no appeal. He soon learns that he must submit to their will, however arbitrary or unreasonable it may be, and usually does so in silence. Unfortunately, the courts of Westminster Hall, after the passage of the Carrier act, and before the full introduction of railways, entered upon a course of adjudication quite favorable to these designs, and established not a few precedents subversive (as we conceive) of the policy of that act, which they held to be binding on them after the roads came into full activity. According to Mr. Justice Blackburne, this took place about the year 1842 (Vide 10 H. L. C. p. 499). "It was," he says, "about the time of the decision of Hinton *vs.* Dibbin" (which was made in '42) 'that railways came into general use and began to supercede all other modes of conveyance." Hence, the managers of these enterprises having the advantage which these precedents conferred upon them, experienced little difficulty in making the contract system under the sixth section almost universal, thus abrogating not only the common law rule of responsibility, but substantially the other provisions of the "Carriers' Act."

But, we will let Ch. J. Cockburn speak to this point. In Peck *vs.* The Directors of the North Staffordshire Railway Co., 10 H. L. C., p. 556, he says: "There cannot be a doubt that, practically speaking, the introduction of railways has destroyed the competition which formerly existed, and the effect of which was to secure to the goods owner fair and reasonable terms from the carrier between certain distant termini. Between some, indeed, where there happened to be more than one line of railway"....."some competi-

tion may be said to exist, but over the greater portion of the country, and even on the lines to which I have just referred, between the intermediate places, it is idle to talk of competition as practically existing. On the other hand, the absence of other means of conveyance, as well as the increased rapidity of transport, compels the owner of goods, at least for all purposes of business, to resort to railway conveyance. He is thus at the mercy of the carrier, and has no other alternative but to submit to any terms, no matter how unjust and oppressive, which the latter may think fit to impose"..... "Master of the field," (he afterward adds), "railway companies lost no time in introducing into their contracts conditions of immunity, not only against liability in respect to loss or injury arising from circumstances beyond their control, but also against liability in respect to loss or injury resulting from their own negligence, however gross or inexcusable."

In the same case (10 H. L. Cases, p. 493), Blackburne, J. admits that in 1832 (when Judge Story's work on bailments was published) that the law on this subject, as established by our Courts, both National and State, fell on lines in substantial concidence with those recognized and sustained by the Courts of Westminster Hall; he quotes section 549 of that work as follows:

"It was formerly a question of much doubt how far common carriers on land could, by contract, limit their responsibility upon the ground that, exercising a public employment they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties." After making some remarks of his own, Judge B. proceeds with his quotations from Judge Story, as follows:

"Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility so as to evade altogether the salutary

policy of the common law. They cannot, therefore, by any special notice exempt themselves from responsibility in cases of gross negligence or fraud, or by demanding an exorbitant price compel the owner of the goods to yield to unjust and oppressive limitations and qualifications of his rights. And the carrier will be equally liable in the case of the fraud or misconduct of his servants as he would be in case of his own personal fraud or misconduct."

In commenting on the above, Judge Blackburne says (Ib. p. 494): that in his "opinion the weight of authority was, in 1832, in favor of this view of the law," but then, he adds, "the cases decided in our Courts" (meaning the Courts of Westminster Hall) "between 1832 and 1854 establishes that this was not law, and that a carrier might, by special notice, make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct or fraud on the part of his servants."

It seems to us that Judge B. is far from being accurate in saying as he does, in effect, that the adjudications of Westminster Hall, subsequent to 1832, prove that the anterior decisions are not law, and that it would be more correct to say that at, or soon after, the date named, those Courts entered upon a latitudinarian treatment of this subject, adding one unfortunate precedent to another, until they succeeded not only in subverting great fundamental principles, but in rendering the Carriers' Act in some of its most important provisions a complete nullity. This will sufficiently appear from the subsequent expositions of the learned Judge. After making the remark above quoted he takes up these intermediate cases, that is to say, the cases decided by the English Courts between '32 and '54, and gives them an exhaustive examination, and deduces from them (Ib., p. 506) the following conclusions, to wit: that, although according to the Carriers' Act "no public notice or declaration

could, as such, in any way effect the liability of a carrier as regards goods in general," yet "special contracts might be made at common law," and "that such notices or declarations, when brought home to the customer, did operate as being the basis of a special contract to carry on the conditions contained therein, and that such conditions when made part of a special contract were binding, even when protecting the company from responsibility for loss or injury, however caused," and "that a special contract ought to be inferred from the act of a party in sending goods after the receipt of a notice, even when the party protested against it."

In view of the provisions of "the Carriers' Act" these would seem to be very remarkable results. It will be observed that the 6th section does not provide for the validity of "a special contract," between "a carrier and any other party for the conveyance of goods and merchandise," but merely "that nothing in that act contained shall extend to or be construed to annul, or in any wise to affect any such contract," or in other words all such contracts are to be and remain on precisely the footing they occupied before the passage of the act, and the question of the validity was to be settled on common law principles. But on the other hand the invalidity of "notices" is in and by the 4th section declared in express terms. It provides that no public notice or declaration made or to be made by a common carrier "shall be deemed or construed to limit his liability at common law in respect of any articles or goods to be carried or conveyed by such carrier, but he shall be liable as aforesaid to answer for the loss of or injury to the same" (with exceptions not material to be stated), "any particular notice or declaration contrary thereto notwithstanding." One would suppose that there could be no difficulty in so construing the two sections, and in so deciding cases arising under the one or the other that both could stand together. Notwithstanding the provision made in and by the 4th section for the

nullity of notices, the English Courts hold that all any carrier had to do was to draw up a specification of his terms or conditions and to exhibit the same to each customer as he should appear, and that then on his delivering the goods there would spring into existence a contract binding on him in spite of anything he could do or say to the contrary.

If this construction of the Carriers' Act was right, then Mr. Justice Bronson was egregiously mistaken in declaring as he did in Hollister vs. Nolen (19 Wend. R., p. 249), that by its provisions "the whole doctrine which had sprung up under notices is cut up by the roots." On the contrary, under the *culture* of Westminster Hall, it seems to have become more vigorous than ever. To contracts thus deduced from notices nolens volens are of course to be added all contracts formerly entered into by the parties, so that in one way or the other the railway companies of the United Kingdom could in every case secure absolute immunity from liability for loss of or injury to property resulting from the negligence of themselves or their employees of any or every degree.

It will no doubt strike the profession in this country with some surprise that the English Courts should in this regard have exhibited so little of that conservatism which characterized the judgment of this Court in the case of the New Jersey Steam Navigation Company vs. The Merchant's Bank (6 How. U. S. Rep. 444).

The railway companies of the United Kingdom having, in the manner indicated, been clothed with absolute power in the premises, soon introduced and ere long made universal a state of things that was absolutely intolerable, and another interposition of parliament became indispensable. This was accomplished in 1854 by the passage of the act of 17 and 18 Vic., Ch. 31, entitled "an act for the better regulating of the traffic on railways and canals," usually denominated "the railway and canal traffic act."

The seventh section of that act provides in substance that every railway company, canal company, and railway and canal company shall be liable for the loss of or any injury to any horse, cattle or other animal, or to any article, goods or things in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, and that no special contract between such company and any other parties in the premises shall be binding upon or affect any such party, unless the same shall, (1) be reduced to writing, (2) be signed by the owner or person delivering the animal or goods, and (3) *be adjudged by the Court or Judge before whom any question relating thereto shall be made, to be just and reasonable.*

A very considerable number of cases to which this section was applicable, have already been presented to the Courts of Westminister Hall, and it is now settled there that railway companies may, by a special contract, exonerate themselves from the responsibilities of insurers, but can not from the obligation to use due care for the safe transportation and delivery of the animal or thing to be carried—that a contract to that effect is not "just and reasonable," and is therefore void.

Peck vs. The North Staffordshire Railway Company, 10 H. L. Cases, p. 473.
Gregory vs. The West Midland Railway Company, 2 Hurl. and Colt, p. 194.
McManus vs. The Lancashire and Yorkshire Railway Company, 4 Hurl. and Nor., p. 327.
Simon vs. The Great Western Railway Company, 18 Com. Birch R., p. 805.

In both Gregory vs. West Midland Railway Company

and in McManus vs. The Lancashire and Yorkshire Railway Company, the controversy arose under contracts for the transportation of animals—in the first of cattle—in the the second of horses, and what makes the Gregory case one of particular interest is, that the terms of the contract therein corresponds substantially with those of the contract before us—that is, so much of the latter as relates to the cattle of the defendant in error. The Courts of Westminister Hall having been brought to a proper appreciation of the subject by the seventh section of the act referred to, held that the contract in each of the four cases cited was to be deemed unjust and unreasonable, and therefore a nullity, for the reason that it undertook to release the carriers from an obligation to *use due care* in the performance of the trust confided to them. Now we ask if the English Courts, acting under that section, can pronounce such contracts void because they are unjust and unreasonable, why are they not equally so at common law? It will be recollected that the seventh section does not furnish any criterion by which the courts were to determine whether any particular contract was just or unjust, reasonable or unreasonable. It simply provides that to be binding, it must be adjudged by the court or judge before whom any question relating thereto shall be made "to be just and reasonable." When the judges of Westminster Hall take up any contract, such as appears in this case (and nearly *in haec verba* in the Gregory case) and pronounce it unjust and unreasonable, it is because they think it is intrinsically so, and one would suppose that that is quite enough to make it bad at common law.

It will be recollected that Blackburne, J. says (10 H. L. cases, p. 494) that the cases decided in Westminster Hall, between '32 and '54, prove that the views and opinions of Judge Story in his work on bailments to the contrary effect, are not law, but, on the contrary, we insist that the English cases, subsequent to '54, prove that the intermediate cases

(that is to say, those decided between '32 and '54) are not law, and that the views and opinions of Judge Story are and ever have been law. To suppose "the policy of the law" (to use the words of Ch. J. Holt) to embark in the business of getting up "a politic establishment for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons," (alias railway companies), "that they may be safe in their ways of dealing," and then to suppose the same "policy" to thereupon engage in contriving ways and means for undermining, subverting and rendering perfectly useless, the "establishment" aforesaid, by means and agencies, easily resorted to and perfectly effective, so as to deprive parties intended to be protected, of all protection, is to make the aforesaid *ideal personage* cut a most ridiculous figure on the pages of juridical exposition.

That these views are sound appears from the opinion of Read, J., in Pennsylvania Railroad Company *vs.* Henderson 51 Pa. State Rep., p. 325, wherein the learned Judge, after commenting on the decision of the House of Lords, in Peck *vs.* The North Staffordshire Railway Co., to the effect already explained, says in conclusion, "such is the law of England at the present day, brought back to what was the original common law rule by act of Parliament, and the salutary decision of the Court of the last resort, the House of Lords."

And then the Judge adds further: "When looking at our own decisions we can congratulate ourselves that we were never led away from the common law, as understood thirty-five years ago, by the erroneous decisions of the English judges, which were finally corrected by act of Parliament." (Ib., p. 328).

We therefore insist that common carriers, and particularly railway companies, can not be tolerated in attaching to their engagements unjust and unreasonable qualifications and con-

ditions, and that they are liable in all cases for the loss of or injury to property, by reason of the negligence of themselves or of their servants and agents, however strong or comprehensive the words of exoneration may be. A case recently decided by the Court of Appeals of the State of New York settles this question in conformity with the views here expressed.

Steinway *vs.* The Erie Railway Co., 43 N. Y. Rep., p. 123.
Wells *vs.* The Pittsburgh, Ft. Wayne and Chicago Railroad Co., 10 Ohio St. Rep., p. 65. *marg. note.*

"A railroad company, acting as a common carrier of live stock, cannot, by special contract, procure exemption from responsibility from losses arising from its own neglect of the duties incident to such employment."

"Such common carrier is liable for damages resulting from defective and unsafe cars or vehicles of transportation, notwithstanding an express contract to the contrary."

Other American cases to the same effect:

Jones vs. Voorhies, 10 Ohio Rep., p. 145.
Davidson vs. Graham, 2 Ohio St. Rep., p. 131.
Graham vs. Davis, 416, 362.
The Cleveland, Painesville and Ashtabula Railroad Co. vs. Curran, 19 Ib., p. 1.
Goldey vs. The Pennsylvania Railroad Co., 30 Pa. St. Rep. (6 Casey), p. 242.
Powell vs. The Pa. Railroad Co., 32 Ib. (8 Ib) p. 414.
The Pa. R. R. Co. vs. Henderson, 51 Pa. Rep., p. 315.
The Same vs. Butler, 57 Ib., p. 335.

Mier vs. The Pa. R. R. Co., 64 Pa. Rep., p. 225.

School District of Medfield vs. The Boston, Hartford and Erie R. R. Co., 102 Mass. Rep., p. 552.

Sager vs. The Portsmouth R. R. 31 Maine Rep., p. 228, per Shepley Ch. J., p. 238.

Before dismissing this branch of the subject we take leave to remark that Ch. J. Selden, in his effort to obtain from the chattel damage cases "some light" to show what should be done with a personal damage case, cites and comments on two English cases of the former class, to wit: Chippendale vs. The Lancashire and Yorkshire Railway Co., 7 Law and Eg. Rep., p. 395, and Carr vs. the Same Company, 14 Ib., p. 340, the tendency of which (we admit) is to prove that in a case of chattel damage the exoneration may be made absolute and complete (Vide 24 N. Y. Rep., p. 209, 210).

But it so happens that those two cases constitute a part of the intermediate cases (of which there are ten in all) produced and commented on by Mr. Justice Blackburne in Peck vs. The North Staffordshire Railway Co., 10 Ib. L. C., from page 497 to page 508, to prove that the law on this subject recognized by the Courts in England, and inculcated by Judge Story in 1832, was not law at the date of the railway and canal traffic act—that is to say, in 1854; but, as in that same Peck case, the learned Judge and a large majority of the Court (consisting nominally of the House of Lords, but in reality of all the Judges of Westminster Hall), held that all such contracts are unjust and unreasonable, where and what is the light sought by Ch. J. Selden in that quarter? Does it not break out in a different part of the horizon, and does it not show with great distinctness where the path of true principle in relation to this subject is to be found?

But it is quite time for us to turn our attention more im-

mediately to the question before us, and to that end we submit the following points:

I. Having shown that it is now well settled in both England and this country, that a contract which exonerates a common carrier from an obligation to use (in respect to all or certain specified risks) due care for the safe transportation and delivery of the chattels carried is null and void, then *a fortiori* must the stipulation with which the agreement of the 5th of June closes, (interposed as a defense in this case) be deemed equally so. It would be very strange were the law to pronounce certain stipulations, of the character alluded to, to be unjust and unreasonable in the case of a brute, and therefore void, but in the case of a man perfectly consonant with justice and reason and therefore valid. The highest court known to the British Empire has affirmed the former; what reason can the opposite counsel assign why the highest court known to this North American Republic should affirm the latter?

II. But the learned counsel to sustain themselves will have to take the ground that the brute has decidedly the advantage of the man, or, in other words, that a railroad company can take a much broader exoneration in case the latter is the subject, than it can when the former is, and that is exactly what this contract does. By its provisions the defendant in error is, so far as the same relates to his cattle, made to assume only certain specified risks, and all the other risks are left to rest on the plaintiff in error, as at common law, but so far as the same relates to himself he is made to assume all the risks. The cattle risks enumerated to be taken by the defendant in error are comparatively few, but there are numerous other cattle risks, such as defective engine, broken rail, misplaced switch, rotten bridges, collisions, mistakes or carelessness of engineers, brakemen and other em-

ployees of the company—all or any one of which may result in injury to the animals or stock. Should anything of the kind happen, the company is unquestionably liable to the stock owner, there is nothing in the contract to exonerate it from responsibility for damages arising from causes other than those specified. But suppose an injury accrues to the person of the defendant in error from any one of these causes, are the plaintiffs in error liable? The opposite counsel would say no! for is it not written in the contract that he was to ride on this train "at his own risk of personal injury from whatever cause." Can it be possible that the law will sanction any such distinction? We will bring this matter to an effectual test. The drovers uniformly occupy a seat in a passenger car attached to the rear end of a cattle train. We will suppose that the train which left Buffalo on the 5th of June with Mr. L. and his stock on board, had, at some point on the road, been telescoped by a succeeding train, running at a speed of forty miles an hour, and that Mr. L. had been put to death or grievously injured, and one half of his stock killed, will the opposite counsel claim that there is a distinction between the two cases? and that while the company is liable for the stock it is not liable for the personal injury received by the owner of that stock. They will find it a pretty serious undertaking to maintain any such position.

III. The reason assigned why a common carrier should, irrespective of contract, be held to high responsibilities, is that he exercises a public employment, and has public duties to discharge. A railroad company is a public institution, created by public authority for tor great public purposes and subject to public supervision and control. To enable it to realize the objects of its creation it is clothed with extensive powers, prerogatives and privileges. And what is that object? It is to exercise the same public employment, and perform the same public duties which were formerly exer-

cised and performed by private individuals. Among these duties is that of transporting from place to place men, women and children with comfort, celerity and safety. The element of safety is of the very highest importance, and nothing short of the exercise of the utmost care, vigilance and skill can be an adequate response to the obligation thence arising. It has been said by high authority that any negligence in that connection is gross negligence, so terrific are the consequences of disaster on a railroad. It would seem that to allow one of these companies to secure to itself irresponsibility for such consequences by bargain with a passenger, would be to defeat *quo ad hoc*, the most prominent of the duties incumbent upon it, which is not only to transport passengers, but to transport them safely.

Caldwell *v.* The New Jersey Steamboat Co.,
47 N. Y. Rep., p. 282.

IV. It strikes us that for a man to say on some consideration, real or pretended, to a railroad company, no matter what may be your recklessness or that of your servants and agents, you may smash my limbs, and even put me to death, you shall go scot free, would be more worthy of an age of heathenism than of enlightened Christianity. We do not believe that we are extravagant when we characterize such a contract as *contra bonos mores*, and submit that it should receive no favorable appreciation by a tribunal of high moral principle.

V. Now, where is this thing to end? Is it not certain that if these companies secure to themselves the power by the adjudication of this Court to make such contracts with one class of passengers, to wit drovers, they will ere long extend it to other classes? In all probability the emigrant

class will be the next to be victimized. As they are uniformly carried at rates much below that of passengers in general, there is an admirable opportunity to set up the false pretence which appears in this case, to wit, that they (the emigrants) are carried at a reduced rate, and to make that supposed concession the consideration for surrendering all claims to indemnity for injuries received through negligence. Such an agreement would be just as valid as this is. These companies having thus involved the emigrants in their toils, no one can tell what class they would attack next. Probably they would endeavor to make the contract system universal.

VI. The situation of the parties to any such contract, to wit a railroad company on the one hand, and an isolated individual on the other, (often, and perhaps usually, ignorant as to what are his own rights and what are the powers and duties of the company), is so unequal as to make it entirely certain that a recognition by judicial authority of the validity of the same will be attended by monstrous abuses. That was precisely the result of the contract power acquired by railways in England by the decisions of Westminster Hall so vividly depicted by Ch. J. Cockburn and other judges in the case of Peck *vs.* The North Staffordshire Railway Co.

Those citizens engaged in the cattle business will probably suffer more than any other. The cattle must go forward, and the mere fiat of the Company will be conclusive on the owner. He is obliged to act on the instant, and that, too, under a species of business duress not less effective than duress *per minas*, or duress of imprisonment. It is contrary to the policy of the law to permit one set of men to hold another completely at their mercy.

VII. No doubt the relaxation of the common law rule of

responsibility, in favor of common carriers in England, and, to some extent in this country, was due to the supposed harshness of that rule. He was held to be an insurer, and was frequently subjected to serious losses when he was not in the slightest degree to blame, but when, on the contrary, his conduct was highly praiseworthy. But neither a railroad company nor any other party engaged in carrying passengers insures their safety. Let all such parties be guilty of no negligence or dereliction of duty in a matter of such vital importance, and then they will be irresponsible. Besides, where is the line to be drawn? What recklessness is to be tolerated and what not? The word gross does not furnish any rule of discrimination. What is gross negligence or a serious hazard in the judgment of one man, is a very trivial affair in the judgment of another. The introduction of the word gross, by judicial authority, into the treatment of this subject, will be sure to involve the administration of justice in this connection in inextricable confusion. In the case of a carrier of chattels we have a safe line of demarcation to follow. Let him eliminate the obligations of an insurer—that is just—it is safe, but in the case of carriers of passengers there are no such obligations to eliminate.

VIII. We have already adverted to the fact that no railway company has ever made in England, nor in this country, until within a date comparatively recent, an effort to secure to itself this species of irresponsibility by the means indicated. By far the most significant illustration of the novelty of this clause is to be found in the fact that the 7th sec. of the 17th and 18th Vic. Ch. 31 does not include injuries to the persons of the passengers at all, but is strictly limited to the loss of or injury to any "horse, cattle, or other animal, or to any article, goods or thing." It is true that the first section of the act provides that that the word "traffic," as used in the subsequent sections shall be construed to include (among

other things) "passengers and their luggage," and the word "traffic" is used in the second section which prescribes rules and regulations to be observed by the companies in carrying on their business, but it nowhere appears in the 7th section. It is believed that the English Courts would hold that it does include the luggage of a passenger, but it certainly does not include the passenger himself. Why did not parliament introduce into the 7th section not only cattle but the owner of cattle; not only the drove, but the drover, his servants and agents? Only one answer can be given to this question. No such abuses had been practised by railway companies in respect to the former which had long been in respect to the latter. The power to perpetrate them by the agency of contracts had never been displayed by any company, and the possibility of their introduction could not have been contemplated by Parliament, otherwise the provisions of the 7th section would have been made co-extensive with the exigency of the case.

IX. In all the cases from the Court of Appeals the judges (constituting the majority) admit that it is not competent for a railroad company to stipulate for an immunity from damages sustained by or in consequence of its own neglect, and that the stipulation must be limited to the misconduct of employees. But a railroad company is a corporation, and can only act by its officers or agents, and the Court seems to be a good deal perplexed with the question as to what officers or agents are so immediately connected with the company as to make their acts the acts of the company itself. Selden, *J.*, says, in Bissell's case (25 N. Y. Rep., p. 446), that this question is unsettled. But it need not be debated here, for reasons that appeared on the trial, as follows:

We proved explicitly that the defendants had long been

in the habit of overloading their cattle trains, and of thus causing them to be stalled on this embankment.

They knew, or ought to have known, the condition of their road; that this train would arrive on this embankment in the night season, and that, if stalled, the jerking process would be resorted to, which would be likely to throw down some of the plaintiff's cattle; that the plaintiff, and others similarly situated, would be riding on this and other trains to take care of their cattle, and would be likely to get on to the road for that purpose, and would be in imminent danger of being precipitated headlong into one of the openings through the same.

Now, it is established by this Court, in the case of the steamboat New World against King (16 How. U. S. Rep., p. 469), that a practice generally adopted by parties engaged in the same line of business may be presumed to be known to each and every party so engaged, and to have received the assent of such party, making such presumption equivalent to assent expressed. How much more then must it be presumed that a railroad company assents to all practices, evil or otherwise, usually or frequently adopted by their employees. The directors cannot in such case plead *ignoramus* to any purpose.

X. It is of the last importance that the public should be furnished with some precise rule on this subject, one which everybody can understand, which is easily applied, and not likely to lead to controversy or litigation. What better rule can there be than to totally exclude these contracts. If tolerated at all, where is the line to be drawn between such contracts as are admissible and such as are not? The confusion which characterises the action of the Court of Appeals on this question results from the failure of the Judges

(constituting the majority) to agree on any line whatever. That majority seemed to concur in the idea that such a contract might, under some circumstances, be valid, but one would propound one category, and another a different, and the result is that they have settled no principle and agreed on no rule of practical value.

XI. The common law always adapts itself to emergencies as they arise, particularly to such as are urgent, and is eminently conservative of life and limb. Great improvements are made from time to time, producing the most extensive changes in the methods of business, and in the relations, duties and responsibilities of parties. Under these changes new questions arise affecting the welfare of society, calling frequently for the annunciation of new principles or rules, or the modification of old, and turning the judicial mind into new and frequently most interesting channels of thought. In no field for the display of ingenuity, talent and enterprise has there been so great a revolution as that appertaining to the carriage of persons and property, effected by the introduction of steam as a motive power; and this has led to the establishment of rules of adjudication especially adapted to exigencies of great magnitude and which perhaps would not have been thought of, if these exigencies had not existed.

Thus it is held, that a Railroad Company is liable for injuries sustained by the breaking of an axle by reason of a latent defect not discoverable by the most vigilant external examination, if it could have been detected in manufacturing, by any test known in the business.

Hegeman vs. Western Railroad Corporation,
13 N. Y. Rep., p. 9.

So also it is held that such company is bound to adopt any and all new improvements adapted to promote the safety of passengers after such improvements have been sufficiently tested, their value ascertained and is known, and should they fail in this particular, they are guilty of negligence and become liable to parties injured.

Hegeman vs. The Western Railroad Corporation, 13 N. Y. Rep., p. 9.
Smith Adminx. vs. N. Y. & H. R. R. Co., 19 N. Y. Rep., p. 127.
Steinweg vs. The Erie Railway, 43 ib. 123.
Caldwell vs. The New Jersey Steamboat Co., 47 ib. 282.

XII. In no department of jurisprudence have we such a striking illustration of the principle upon which Courts act in recurring to what is denominated the policy of the law, as in that to which this case appertains. They do not in this class of cases, nor in any other, adjudicate on mere considerations of public policy, for that would be judicial legislation, but questions are incessantly arising which involve great interests, public and private, and these questions must be disposed of. The upright and intelligent judicial mind instinctively recurs to the consequences, whether of good or evil, likely to follow from ruling the one way or the other, and there arises at once a disposition to promote the one and avoid the other, or in other words adjudication in such case is guided by what is denominated the policy of the law. No new law is made but that which is and ever has been law receives a new expression and a new development in conformity with right and reason. Is not, then, such a stipulation as we have in this case contrary to the policy of the law, and is not the Court recurring to the safety of the passengers

and the welfare of society constrained to come to the conclusion that it is for that reason null and void?

XIII. Contracts or stipulations in derogation of the common law responsibility, incurred by common carriers of property, our Courts uniformly hold are to be construed strictly, and are not available unless the party can protect himself by words so precise and explicit as to leave no room for doubt or controversy, and that is far from being true in the case before the Court.

N. J. S. Nav. Co. vs. Merchants' Bank, 6 How. U. S. Rep., p. 344.
Wells & Tucker vs. The S. Nav. Co., 8 N Y. Rep., p. 375.
Hoffman & Place vs. Ætna Fire Ins. Co., 32 N. Y. Rep., p. 405.

If this be the rule in respect to property, how much more should the same rule obtain where life and limb are in jeopardy.

XIV. This action is not instituted on a basis *ex contractu*, but on one exclusively *ex delicto*. It is settled conclusively, by the following authorities, that all a plaintiff in a case like this has to prove is, that he was lawfully on the road, or on some train, and then a duty arises, incumbent on the railroad company, to see that he is not injured by any negligence on their part.

Steamboat New World vs. King, 16 How. U. S. Rep., p. 469.
Knowlton vs. Western R. R. Co., 15 N. Y. Rep., p. 444.

Smith, Adminix. vs. N. Y. & H. R. R. Co.,
19 N. Y. Rep., p. 127.
Hurlbut vs. The New York Central R. R. Co.
40 N. Y. Rep., p. 145.

By §44, ch. 140 of the N.Y. Statutes at large, (3 ib. p. 636) it is provided that "it shall not be lawful for any person, other than those connected with or employed upon the railroad, to walk along the track or tracks of any railroad, except when the same shall be laid along public roads or streets." Hence the introduction by the defendant in error on the trial below, of "the memorandum of agreement" and "the pass," was indispensable in order to show that he was authorized by the plaintiffs in error, and, in fact, required by them to get out of the car in which he was sitting, onto the road and to go forward for the purpose of supervising and taking care of his cattle. This was, as we conceive, the only legitimate purpose for which these papers could have been used on the trial and the only effect that can be given thereto on a revision of the questions of law presented by this record.

XV. But what should induce the courts of this country, and particularly this Hon. Court to give a grave consideration to this subject, is the fact that we have no parliament or national legislature as they have in England that is invested by the constitution with powers adequate to the correction of the evils resulting from an unfortunate treatment of it by the State or national judiciaries. These railroad companies are creatures of the States, created by State legislation, and a vast majority of questions relating thereto have to be adjudicated by the courts of the State where they originate. The consideration of most of the cases, like the present, which come before the courts of the United States, depend on the citizenship of the parties; to these may be added those emanating from the district of Columbia, and

the territories, but these are comparatively few. The great majority of the cases have been and will continue to be decided by the State courts and how much inconsistency and incompatibility there will be in their treatment of the subject are sufficiently disclosed by the modern American reports. It is certain that no precise principles or consistent rules will be established for the whole country until they are enunciated in the class of cases already referred by this court.

XVI. The conclusions to which these considerations tend, as it seems to us, with irresistable force, has already been reached by the judiciaries of two of the most prominent of the States of the Union, to wit, of Pennsylvania in two cases, and that of Ohio in one. The judges, when they decided these cases, had the N. Y. cases before them, but held, nevertheless, that contracts like the present are contrary to public policy and are, therefore, null and void.

The Pennsylvania R. R. Co. *v.* Henderson, 51 Pa. Rep. p. 315.
The same Company *v.* Butler, 57 ib. p. 335.
The Cleveland, Painesville and Ashtabula R. R. Co. *v.* Cowan, 19 Ohio Rep. p. 1.

To these should be added the numerous English and American chattel cases already quoted, which, as it seems to us, cover the same ground in point of principle.

XVII. But to do justice to this subject it is necessary to give the New York cases a fuller examination than we have hitherto, and to this end we begin with

(1) The Perkins Case. Assuming that the policy of

the law will tolerate a stipulation of irresponsibility for personal injuries resulting from the misconduct or negligence of employees in the case of a passenger occupying a gratuitous seat on an ordinary passenger train (which we by no means concede), it is believed to be quite apparent that the Company should have been held liable in that case for the following reasons:

(*a*) Perkins, the deceased, was killed by the breaking down of a bridge, in the construction of which, timber was used known to be rotten and utterly insufficient. The particular attention of the track master was called to it at the time; it was, therefore, a case of gross negligence on the part of the track-master and on the part of the company itself. The company had no right to entrust such a vital matter to the action or judgment of one man—they should have examined the bridge and should have done so from time to time and made themselves certain of its sufficiency. They were guilty of gross negligence in that respect.

(*b*) It is admitted by all the judges in these N. Y. cases that a railroad company cannot stipulate for immunity against damages arising out of its own negligence. *Vide* the opinion of Selden, *J.*, in Bissell *vs.* N. Y. Central Railroad Company, 25 N. Y. Rep., 445.

(*c*) The stipulation in that case cannot be construed to include anything more than the ordinary hazards of railroad traveling.

N. J. Steam Navigation Co. *vs.* Merchants Bank, 6 How. U. S. Rep., 344.

Wells & Tucker *vs.* The Steam Navigation Co., 8 N. Y. Rep., 375.

Hoffman & Place *vs.* The Ætna Fire Insurance Co., 32 N. Y. Rep., 405.

(*d*) E. D. Smith, *J.*, in the Perkins case writes a long opinion in opposition to the plaintiff, and against the charge of the judge below, in which the other judges concur. (24 N. Y. Rep., from p. 199 to p. 207.) Then on p. 217, he takes ground directly against his own opinion and insists that the judge at the Circuit was right, for the reason that the negligence in that case was that of the company itself and that therefore they were liable notwithstanding the stipulation. Here we have a most extraordinary exhibition. The principal opinion and a dissenting opinion both written by one and the same judge, and the latter completely annihilating the former.

(2) We have already stated that the two last cases, to wit, the Ward Case (24 N. Y. Rep., p. 222), and the Bissell Case (25 ib., p. 442), were pending in the Court of Appeals at the same time, and were both argued before either was decided of which sufficient evidence may be found in a remark by Ch. J. Selden, 24 N. Y. Rep. 214. We have not perspicacity enough to see any difference in principle between the two cases; as an authority they mutually annihiliate each other, and further comment is believed to be unnecessary.

(3) In the Wells Case (gratuitous) Gould, J., delivers the majority opinion in favor of the validity of the stipulation (24 N. Y. Rep. p. 183 to p. 185), which would seem to call for special notice.

(*a*) He says that "gross negligence is evidence of

fraud, and unexplained is equivalent to fraud." He then adds "that the term has been used in reference to common carriers of goods in pointing out such acts as they were not at liberty to exonerate themselves from liability for, even by an express contract in terms conveying them." "That they could not so exempt themselves," he continues, "was decided on grounds of public policy—evidently for the reason that such acts were evidence of fraud or willful injury, and that a carrier of goods was in so absolute and unwatched control of the goods that it would not answer to allow him to rebut such evidence." By the word "rebut" the Judge evidently means countervail by contract or stipulation. But is not a Railroad Company with its agents and employees in as high a sense "in the absolute and unwatched control," of the lives and limbs of the passenger in a train moving with immense speed as is a carrier of goods committed to his custody or care, and are not the considerations of public policy excluding the stipulation much stronger in the former case than they are in the latter?

(*b*) The learned Judge then proceeds as follows: "holding this to be the true reason of the rule and its right interpetration" to wit, that contracts for immunity from liability for gross negligence are void, "and granting that it applies to individual carriers of persons, does it apply to corporations which carry persons?" He then insists that a corporation cannot commit fraud or a misfeasance because they include motive and will and such a body can have neither one or the other, though its agents may have both. His argument runs thus: "Gross negligence is equivalent to fraud or willful misconduct, but a corporation cannot be guilty of either. It is not a moral agent and is

not bound by the Sacred Decalogue. The injunction "thou shalt not kill" does not touch it, particularly if it is a railroad company. "It would hardly do" he adds, "to hold the property of corporators liable for the willful or criminal acts of the persons employed by the corporation;" that is to say for the gross negligence of such persons, "any more," he continues, "than could the owner of a carriage and horses," "be held responsible for the damages should the driver wilfully run them among a crowd of persons, trampling and crushing all before him." This would seem to open up to our railroad companies a new and a very extraordinary line of defence. All they will have to do when called to account for killing a passenger or smashing his limbs by the negligence of some one of their agents will be to confess the negligence and then call witnesses to prove it gross—the more gross and indefensible the better. Let it be a case of manslaughter and perhaps of murder and then the company is to be exonerated and to go scot free. Such an idea is too absurd to be worthy of serious notice.

(*c*) His Honor having satisfied himself that a railroad company cannot be held responsible for the gross negligence of one of its employees any more than the owner of a coach would be liable for the act of his driver who should willfully rush into "a crowd of persons trampling and crushing all before him," next takes up the contrast in the Wells case and plunges into after the fashion of the hypothetical coachman—he tramples and crushes "all before him." That contract is as follows: "the person accepting this free ticket assumes all risks of accidents and expressly agrees that the company shall not be liable under any circumstances whether of the negligence of their agents or otherwise for any injury to the per-

son or loss of or injury to the property of the passenger using this ticket." Nothing can be plainer than that the word "otherwise" was intended to embrace the case of injury or loss by reason of the fault or negligence of the company itself. We are not to be held liable (they in substance say) to the party using this ticket at all, neither for the negligence of our employees nor for our own. There is nothing equivocal about this language. It is as explicit as words can make it. They intended to secure to themselves complete irresponsibility, and perfect immunity under any and all circumstances whatsoever. But to give to the contract that construction the Judge insists, would be to attach to the words "or otherwise" an illegal meaning. Is that any reason for ejecting those words from the contract in toto? Without undertaking to say positively what a learned Judge of that Court can or cannot do emendatory of such a contract as that in the Wells case, it is certain that he would have in dealing in a similar manner with the contract in this case, a pretty hard time of it. It is in these words, "and it is further agreed between the parties hereto that the persons riding free to take charge of the stock do so at their own risk of personal injury *from whatever cause.*" What would Mr. Justice Gould do with such a stipulation as this? What put in, or what out to deliver the case from the category of illegality!

So much for the expositions of his Honor in the Wells case. But he appears again in the Bissell case, and gives an opinion in favor of the validity of the stipulation, in which the majority of the Court concur. This opinion has one remarkable characteristic, and that is the great significance and importance which he (the Judge) attaches to the word "free," in connection with the word "ticket," as used in the

stipulation. It is nearly a verbatim copy of the stipulation in the Wells case. This word "free" has, in the judgment of his Honor, a wonderful power and efficacy. After turning it over a half a dozen times, he concludes thus, "further, if he may make a contract by which he shall ride free, may he not, by contract, say he is riding free, although he has paid for the transportation of his goods?" (25 N. Y. Rep., p. 444.) Certainly, learned Sir, and, particularly so, if, in paying for the transportation of his goods, he paid for his own transportation, and for both at one and the same time. It is implied in the Bissell case, but in this case it is expressly averred. Every one rides in a railroad train *free* after he has paid his fare! His Honor, however, concludes thus, "how has the Court any right to alter his contract, and say he is not riding free?" "Alter his contract!" Heaven forbid! that would be a work of supererogation! He was riding free! No doubt about it! But what sort of treatment is this for a question which, in point of principle, is one of the most interesting, and in its bearing on the welfare of society, one of the most important submitted to courts of justice in modern times. A few brief paragraphs pretty thoroughly interlarded with the word "free," without citation of authorities, exposition of principles, presentation of analogies, or consideration of effects and consequences can hardly be adequate to the solution of a problem such as that presented in the Bissell case, and also in the case now before this Court.

4. We now return to the consideration of the duplex opinion of Selden, Ch. J., or rather to the first and second edition of that opinion, (edition No. 1, 24 N. Y. Rep., p. 208 to p. 217, and edition No. 2, 25 Ib., p. 445 to p. 452) to which we attach the more importance, as it

seems to contain an exposition of the considerations on which all the judges acted (except Gould, J.) who concurred in, according to the stipulation, a qualified validity. We have already seen that the Chief Justice, after insisting that the case of the loss of or injury to goods, and that of injury to the person of a passenger are analagous in principle, proceeded to quote two cases of the former class from the adjudications of Westminister Hall, which imported that words of exoneration, no matter how general or indefinite they may be, are to be taken in a comprehensive sense, and are to be held to include everything which any universality of expression can include. But, no sooner had the learned Chief Justice quoted his authorities, and established his analogy than he rejects both the one and the other. He admits that it would never do to hold that it is in the power of a railroad company to secure to themselves, by contract, an absolute immunity from liability for injuring a passenger by reason of negligence in all cases whatsoever, and he insists that there must be some qualification of the power, his English authorities to the contrary, notwithstanding.

In the first edition of his opinion (24 N. Y. Rep., p. 213) he says "the principle therefore is, that parties can not contract that they themselves may, with impunity, be guilty of willful misconduct, or that degree of recklessness which is its equivalent. To this extent, no doubt, carriers of passengers are precluded from absolving themselves, by contract, from their responsibilities. There is some difficulty in applying these principles to railroad companies, on account of the artificial nature of Corporations." . . . "But a distinction is no doubt to be made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation, and are

its only direct medium of communication with the outside parties, they must, in respect to all external relations, be considered as identical with the corporation itself."

In edition No. 2 of his opinion (25 N. Y. Rep., p. 446), the Ch. J. says in substance that "the question" is "as yet unsettled," "what servants or agents are to be regarded as so directly representing the company that a contract relieving the Company from responsibility for their negligence may not lawfully be made." We are happy to agree with his honor, the question referred to was not only not settled at the date of the adjudication in the Bissell case, but has not since been settled and never can be. No line of discrimination, such as is propounded by the learned Ch. J., can be drawn that would be of the slightest practical value. Where shall that line be drawn? Shall it be between the President and Directors on the one hand, and the General Superintendent, conductors, engineers and other subordinate agents on the other? The Ch. Justice says that "the Directors of a railroad company are its only direct medium of communication with the outside public." This we must be permitted to deny. So far as our observations have extended, the General Superintendent of the road, speaking as such, and not for or in the name of the Board of Directors, is the sole medium for such communications. It is the Superintendent who promulges time tables, rates of fare and rules and regulations to be observed by passengers and others. The public hear nothing from the Directors as such, though the Superintendent is no doubt all the while acting by their authority and in conformity with their wishes. But the manifestation of that authority and the communication of their wishes are all the while kept out of view. The public know and can

know nothing of either, except as they appear in the conduct of the Superintendent. So far as the transportation of passengers in general is concerned, the superintendent is the great, the paramount character. But when a single train moves he sinks into insignificance in comparison with the conductor of that train, who has frequently in charge hundreds of passengers whose safety in life and limb depends in no small degree on his vigilance and skill. So far as passengers are concerned, the conductor is the sole medium of communication with the corporation. The next most important character is the engineer, whose position is little less responsible than that of the conductor. Not a man on board of any train hears a word from the directors. How absurd, then, is it to draw the line as proposed by the Ch. Justice, making stipulations for the negligence of the directors, who never appear, invalid, but stipulations for the negligence of the general superintendent and of the conductor of each train, who alone do appear, good and valid. It appears from the Perkins case, that in the judgment of a majority of the Court of Appeals the fact thatthe roadway of the company (of which the bridge over Sauquoit Creek constituted a part) had at all times been in a highly dangerous condition, was not adequate to fix on the directors the imputation of negligence, and it appears also from the Ward case (24 N. Y. Rep., p. 222), that in the judgment of Selden, Ch. J., and Allen and Gould, Justices, the fact that the company furnished an unsafe and defective car, is not adequate to the same end. How then, can it be possible in any case to establish the charge of negligence against the directors? They meet in secret, the minutes of their proceedings are kept secret, and were it otherwise, what would they avail? In short, the distinction propounded by Ch. J. Selden and concurred in by several of his associates, is to the last degree illusory and vain.

(5.) In the case of the Pa. Railroad vs. Henderson, 51 Pa. Rep., p. 327, Judge Read adds, after commenting on the four N. Y. cases: "In no one of these cases are the arguments of counsel reported, and it is evident that the latter decisions of the English Courts were not referred to and the very important case of Peck vs. The North Staffordshire Railway Company had not then been decided, when the whole course of the English decision was reviewed and criticised. They cannot therefore have the weight to which, under other circumstances, they would be entitled."

(6.) In opposition to the incongruous opinions of the five Judges constituting a majority of the Court of Appeals, we produce the well-considered and strongly-reasoned opinions of Sutherland, J., in the Wells case, (24 N. Y. Rep., p. 186 to p. 196), of Wright, J., in the Ward case (24 N. Y. Rep., p. 223 to p. 226,) and of Denio, J., in the Bissell case (25 N. Y. Rep., p. 455 to p. 461). A great preponderance is given to these opinions by the high appreciation expressed by the Supreme Court of Pennsylvania of their character, and by the full concurrence, not only of that Court, but also of the Supreme Court of Ohio, in the soundness of the principles enunciated and correctness of the positions therein taken. The decisions in the Pennsylvania and Ohio cases were unanimous, and these, with the decision of a majority of the Court of Appeals in the Ward case (24 N. Y. Rep., p. 222), would seem to settle the matter in debate so far as it can be settled by State authority.

XVIII. The questions of fact, whether the defendant in error was, on the occasion adverted to in the record, injured solely by or in consequence of the negligence of the plaintiffs

in error or of their servants and agents, or by and in consequence of his own negligence only, or of his own negligence concurring with that of the plaintiffs in error and of their servants and agents, were all properly submitted by the learned judge to the jury and the issue found for the defendant in error. The authorities would seem to conclusively sustain the regularity and correctness of the proceedings of the court below.

Hurlbut vs. The N. Y. Central R. R. Co., 40 N. Y. Rep., p. 145.
Caldwell vs. The New Jersey Steamboat Co., 47 ib., 382.

XIX. The numerous exceptions taken by the counsel for the plaintiffs in error to the rulings of the learned judge, on objections to evidence offered by the defendant in error on the trial below, would seem to us to be too frivolous to be worthy of serious notice, but there is one of such a remarkable character that we feel it to be a duty to invite attention to it.

By §31, Chapter 140 N.Y. Statutes at Large, (3 vol. p. 629) it is provided, in substance, that every railroad company formed under that act shall make an annual report to the State Engineer of the operations of the road during the year ending on the 30th day of September, verified by sundry affidavits and filed in the office of the State Engineer by the first of December in each year, and shall state many particulars, among which are the following:

"102" (ib. 333.) "The number of persons injured in life and limb and the cause of the injury, and whether passenger or person employed."

"Whether any such accidents have arisen from carelessness or negligence of any person in the employment of the

corporation and whether such person is retained in the service of the corporation."

On the trial below, the counsel for the defendant in error produced and proposed to read from a report made by the plaintiffs in error to the State Engineer, a statement of the number of accidents which happened on the road of the plaintiffs in error during the year 1858, the following extract:

"June 6, Charles Lockwood, while walking on the track at Canastota, at night, fell through an open culvert, sustaining some bruises by the fall."

To this evidence the counsel for the plaintiffs in error objected, but the court overruled the objection and the same was read in evidence to the jury.

As this testimony obviously tended to establish claims by the party offering it as to facts in dispute, some material and others pertinent, the opposite counsel will be hardly able to maintain the proposition that such testimony became inadmissible because it at the same time served to illustrate the disingenuousness and unfairness with which this subject has been treated by the plaintiffs in error *ab initio*.

Truman Smith
for Deft in Er